

**PROSECUTIONS
CASE STUDIES
SERIES**

Lessons from the Deployment of International Judges and Prosecutors in Kosovo

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for Transitional Justice*

March 2006

About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.

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HYBRID COURTS CASE STUDY

LESSONS FROM THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO¹

5 March 2006

This case study seeks to provide basic information and policy analysis on the deployment of international judges and prosecutors in Kosovo, a program that was established under the UN Mission in Kosovo (UNMIK) in 1999. It is part of a series that aims to provide information and analysis on policy and practical issues facing hybrid courts. In Kosovo, hybrid courts were established when international capacity was injected into the domestic legal system. The lessons that can be drawn from this experience are divided into the following areas:

- A brief history of the conflict in Kosovo
- Background to the establishment of the international judges and prosecutors (IJP) program
- A description of the IJP program
- Prosecutorial strategy and case selection
- Legal framework
- Court administration and witness protection
- Cost and efficiency
- Relationship with the International Criminal Tribunal for the former Yugoslavia and other transitional justice mechanisms
- Outreach, public perceptions, and ownership
- Exit strategy and legacy

The purpose of this case study is to provide basic information, some of which is still not widely available, on these areas to guide policymakers and stakeholders in establishing and implementing similar mechanisms. Similar case studies have been developed on Sierra Leone and Timor-Leste.

Summary of Conclusions

Kosovo is entering its sixth year in the aftermath of intensive ethnic conflict and longstanding systematic discrimination and it has been five years since the deployment of internationals into its legal system. The creation of the various aspects of the Kosovo system of international judges (IJs) and international prosecutors (IPs) must be understood as a series of reactive developments to the needs and political reality of the immediate post-conflict situation, as opposed to any planned or strategic transitional justice initiative to deal with past crimes. The system has made halting steps forward, although its contributions have been limited by continuing security concerns, concerns regarding independence, ad hoc planning, and poor implementation including the absence of any concrete plans for hand-over.

¹ This case study was written by Tom Perriello and Marieke Wierda. Laura Dickinson assisted with an early draft. Tom Perriello traveled to Kosovo in Nov. 2003 for the purposes of this study. The views expressed herein are those of the authors and not ICTJ. We are grateful to Richard Rogers, Ayumi Kusafuka, Mark Freeman, Annie Bird and Vita Onwuasoanya for assistance in updating and reviewing this study.

- *Impact.* While many expected that infusing the legal system in Kosovo with international capacity through the IJP program would have a more widespread impact, to date, its effect has been limited mainly to substituting for, rather than bolstering, domestic capacity. A key factor has been the exclusion of local actors from policy issues relating to justice. In effect, the IJP program functions very much as a parallel system with a particular focus on sensitive cases, including organized crime, drug trafficking or corruption, perpetrated by networks supported through Kosovo's powerful clans, which local judges are reluctant to try themselves.
- *Legitimacy.* While the IJP system has inspired a certain level of trust in the legal system, this is mainly in the international handling of cases, rather than in the domestic system in general terms. Local legal professionals agree that the IJP program has been necessary and continues to serve a valuable purpose, but that the continued need for internationals may be undermining long-term local confidence in the domestic legal system. Also, nationals have been excluded from the design of the program and key decisions made in the course of its implementation.
- *Independence.* While the IJP program itself and the efforts of individual internationals may enjoy a measure of credibility in Kosovo, the wide discretion of UNMIK's executive over judicial matters has clouded perceptions of independence and been a stumbling block to establishing respect for the law. A proper framework elucidating the boundaries of these powers would have assisted in diminishing perceptions of arbitrariness and inappropriate interference.
- *Fairness.* While IJPs have been helpful in ensuring that justice is achieved in individual cases, their deployment has not necessarily led to requisite measures of fairness in trials. The current legal framework is complex and requires continued training of national and international legal professionals to yield better-quality decisions. The direct applicability of the European Convention on Human Rights may have a positive impact on fairness over time. However, the OSCE which is monitoring the process continues to find that improvements in domestic trials are needed in key areas.² Perceptions of fairness continue to divide along ethnic lines. Furthermore, UNMIK's lack of any proactive strategy has hindered the transparency of the IJP program, and the Mission has missed opportunities to shape perceptions and expectations.
- *Overall efficiency.* Numbers tried in Kosovo are comparable to those of other domestic systems. While several of the national judges and prosecutors comment that international participation has slowed down trials, an extended and more deliberate criminal process may be seen as beneficial.
- *Legacy.* Although the IJP system has not fared badly in terms of total numbers tried, it may be seen as inefficient if it does not result in systemic impact in terms of legacy. On the other hand, expectations of what can be legitimately achieved in terms of systemic change over only six years should be realistic. However, it is essential that adjustments be made to allow for systemic change from now on.

Inadequate resources and finding suitably qualified (and trained) international staff are significant obstacles, although this is perhaps a product of the manner in which the IJP evolved and developed. Some would argue that a more centralized system of international capacity could have

² See, e.g., Organization for Security and Cooperation in Europe (OSCE), Legal Systems Monitoring Section (LSMS), "Review of the Criminal Justice System," (April 2003–Oct. 2004) on Crime, Detention and Punishment.

avoided some of those problems by improving conditions of service and making internationals feel less isolated. Others might argue for the benefits of spreading internationals throughout the national system, although the capacity-building benefits have not been maximized, and interaction between internationals and nationals could have been more strategic.

Observers have noted that national capacity in Kosovo to try complex or politically sensitive cases remains limited. The IJP system in Kosovo will probably need to be retained for the foreseeable future. This does little to increase the level of trust in the local legal system. An extended international involvement may provide new opportunities to redirect some of the efforts, in terms of being more strategic. An approach will need to be devised that is more oriented to skills-transfer and eventual handover, to work toward a completion strategy for the IJP program.

Kosovar legal professionals should be integrally involved in the design of the strategy, reversing the current culture of lack of consultation. It is also important that international policy makers begin to concentrate their efforts on ensuring that there is increased public understanding of the limitations of the system through dedicated and targeted outreach and community education. All of these steps are needed to consolidate the considerable efforts of the international community and to ensure their long-term impact.

LESSONS FROM THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO

I. INTRODUCTION

A. Brief History of the Conflict

Kosovo is a small, landlocked territory in center of the former Federal Republic of Yugoslavia, bordering Macedonia (FYROM), Albania, and Serbia and Montenegro. Since the conflict, according to UN Security Council Resolution 1244 of June 10, 1999, Kosovo has been designated an autonomous part of Serbia and Montenegro (within the state of Serbia) under the administration of the United Nations. Kosovo has a population of approximately 1.9 million, of which an estimated 90 percent are ethnic Albanians.³ An additional 550,000 Kosovars are estimated to live in the diaspora, mostly concentrated in Germany, Switzerland, and Serbia proper.⁴ Residents are 60 percent rural, with an estimated population of 400,000 in the capital city of Prishtinë/Priština.⁵ Kosovo has the youngest population in Europe, with a median age of 22.5. Moreover, it is one of the poorest territories in Europe. The economy was virtually destroyed during the war. The Gross National Disposable Income is estimated to be Euro 1000 per capita.

Kosovo's ethnic tension is symbolized in Serbian myths surrounding the Battle of Kosovo in 1389, during which Serb forces allegedly fought nobly and lost to Turkish forces, with whom the Albanians chose to align. While historians generally conclude that various Serb and Albanian factions fought on both sides of the conflict, the Serb legend has remained a rallying cry for nationalists ever since.⁶ In the centuries between the Battle of Kosovo and the late 1980s, most Serbs migrated north into Serbia, and an increasing number of Muslim Albanians emigrated from the mountains of Albania. When Serbia gained independence in 1878, Kosovo remained under the Ottoman Empire. In 1912, Serbs and other European forces forced out the Turks, liberating many Serbs within Kosovo but also massacring many Albanian "collaborators." For the next four decades, Kosovo repeatedly changed hands, and with each new regime, the ethnic group coming into power usually exacted vicious retaliation against other groups.

In 1974, Tito granted Kosovo a form of autonomy similar to—but distinct from—that enjoyed by the six states comprising the federation of the former Yugoslavia. The ambiguity of this sovereignty created increasing tension after Tito's death. Kosovo was approximately 90 percent Kosovar Albanian, but minority Kosovar Serb populations claimed strong historic ties. Kosovar Serb populations are concentrated in a few key communities (mainly enclaves), including for instance the northern section of Mitrovica, and they claim certain religious sites within Kosovo, such as the Serbian Orthodox monastery in the western province of Pec/Peje, as historically vital.

Slobodan Milosevic became the leader of the Serbian Communist Party in 1987 and was elected President of Serbia in 1989 on a nationalist platform that deemed control over Kosovo a central

³ Statistical Office of Kosovo, "Kosovo and its Population," revised version (June 5, 2003), available at www.sok-kosovo.org/pdf/population/Kosovo_and_its_population.pdf.

⁴ The UN estimates that there are 110,000 Kosovar Serb internally displaced persons (IDPs) in Serbia proper, while Belgrade claims that the figure is more like 250,000. (On the number of IDPs according to Belgrade, see www.kc.gov.yu/C-ingleski/aktuelno/program_povratka.html.)

⁵ See UNDP report at www.kosovo.undp.org/HDR/hdr.htm.

⁶ Noel Malcolm, "The Battle and the Myth," *Kosovo: A Short History*, New York: HarperPerennial, 1999, at 58–80.

tenet.⁷ In June 1989 and on the 600th anniversary of the Battle of Kosovo, Milosevic held a massive rally near Pristina to celebrate Serbia's control over Kosovo, a process that he had initiated years earlier. Milosevic spoke of battles won and yet to come,⁸ his first attempt to consolidate control over Yugoslavia and encompass Serbian minorities within a "Greater Serbia."⁹ In essence, it heralded the reverse of Kosovo's autonomous status.

During the 1990s, Serbian authorities ruled Kosovo with repression and abuse. Discrimination was widespread and many Albanians were summarily dismissed from their jobs. The Albanian leaders forced out of power in 1989 initially resisted peacefully by setting up a parallel government in exile. However, other Kosovar Albanians banded together to form the Kosovo Liberation Army (KLA), and by the summer of 1998, tensions between the KLA and Serb authorities had escalated into a full-scale armed conflict.

Serbian forces repeatedly responded to small-scale KLA attacks on Serbian targets with excessive force, launching a government offensive to crush civilian support for the rebels. Government forces attacked civilians, systemically destroyed towns, and forced hundreds of thousands of people to flee their homes. In return, Serb civilians were victims of abductions, beatings, and executions at the hands of ethnic Albanian paramilitary forces such as the KLA, which also targeted ethnic Albanians suspected of collaborating with Serbs.¹⁰

For the first eight months of 1998, the internal armed conflict between government and KLA forces resulted in an estimated 2,000 Albanian civilian deaths.¹¹ The October cease-fire brought Organization for Security and Co-operation in Europe (OSCE) monitors as part of the Kosovo Verification Mission, but violent incidents continued. Then, on January 15, 1999, Serbian paramilitaries attacked the village of Racak, killing 45 persons. Human Rights Watch reported that although the attack might have been provoked by a KLA ambush of three Serbian policeman a few days earlier, government forces responded by indiscriminately shooting civilians, torturing detainees, and committing summary executions.¹² After the Racak massacre, the international community began to increase pressure on Serbia.

Talks in February and March 1999 in Rambouillet failed to resolve the status of Kosovo through means of diplomacy. Subsequently, Serbian paramilitary forces engaged in a full-fledged campaign of ethnic cleansing against civilians, killing many and causing massive displacement that forced some 850,000 Kosovar Albanians to flee the province. On March 24, NATO began an

⁷ Before a Belgrade crowd of 300,000 in November 1988, Milosevic said, "Every nation has a love which eternally warms its heart. For Serbia, it is Kosovo." Prosecutor v. Milosevic et al., Prosecution's Pre-Trial Brief, ICTY Case IT-99-37-PT, n. 14.

⁸ Id.

⁹ See Noel Malcolm, "Kosovo After the Death of Tito (1981-1997)," Kosovo: A Short History, *supra* note 6, at 340-350 (explaining how his control of Kosovo would change the voting balance of the federation of states within Yugoslavia).

¹⁰ See generally Amnesty International, Annual Report 2000, Federal Republic of Yugoslavia, available at www.web.amnesty.org/web/; Human Rights Watch, World Report 1999, Federal Republic of Yugoslavia, available at www.hrw.org/worldreport99/europe/yugoslavia.html; Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," 95 Am. J. Int'l L. 46, 2001; Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, Country Reports on Human Rights Practices 1999, Serbia and Montenegro, Feb. 23, 2000.

¹¹ Human Rights Watch, "Federal Republic of Yugoslavia: Human Rights Developments 1999," available at www.hrw.org/wr2k/Eca-26.htm.

¹² Id.

air campaign against Serbian forces that would last 11 weeks. During the bombing, the ethnic cleansing intensified.

On May 27, 1999, in the midst of the fighting and to the chagrin of members of the diplomatic corps, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), Justice Louise Arbour, announced the indictment of Slobodan Milosevic and others on charges of crimes against humanity and violations of the laws of war.¹³ The indictment dealt exclusively with crimes committed in Kosovo from January through late May 1999.¹⁴

The NATO bombing campaign ended with an agreement calling for the withdrawal of Serbian military and police from Kosovo within 11 days.¹⁵ On June 10, 1999, one day after the suspension of NATO's air strikes, the UN Security Council adopted Resolution 1244 (1999), which established the United Nations Mission in Kosovo (UNMIK) and turned Kosovo into a UN protectorate.¹⁶ In the spirit of Rambouillet and in the light of international concerns about setting a precedent for ethnic self-determination, Resolution 1244 deferred the question of Kosovo's status by reaffirming the existing territorial boundaries of the Federal Republic of Yugoslavia (FRY) and calling for "substantial autonomy" and "meaningful self-administration of Kosovo."¹⁷

In the six years since the end of the conflict, Kosovo has been under UN administration. UNMIK has engaged in building state institutions, including the legislative, executive, and judicial bodies, both at national and local levels. However, Kosovar Serbs maintain their own parallel structures, particularly for health and education, and refuse to participate in political structures that have been established while maintaining close links with Belgrade. Significant concerns still exist regarding the ability of national authorities to protect minorities, specifically in the aftermath of widespread violent riots in March 2004.

The economy remains bleak, and nationalist politics are rife in Kosovo. The slogan "no to negotiations, yes to self-determination" is found on many walls. The ICTY has indicted Kosovo's erstwhile Prime Minister and former KLA commander, Ramush Haradinaj. Many former KLA leaders continue to be very powerful, and politics between powerful clans combined with organized crime and corruption create a sense of impunity and put pressure on the local judiciary. All these factors combine to create an inhospitable environment for Kosovo's fledgling legal system.

In October 2005, a report prepared by Special Envoy to the Secretary-General Kai Eide was released that recommended commencing the process to determine the future status of Kosovo.¹⁸ Martti Ahtisaari was appointed Chief Negotiator for the UN, and in late November he made his first visit to the region to open talks. The status question will be difficult to resolve. While the vast majority of Kosovar Albanians believe they deserve independence, most Serbs inside and outside Kosovo vehemently oppose it.

¹³ "President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo," Press Release JL/PIU/403-E, The Hague, May 27, 1999.

¹⁴ Although the ICTY was created in 1993, Milosevic had not yet been indicted over events in Bosnia and Herzegovina or Croatia.

¹⁵ See generally Amnesty International, Annual Report 2000, *supra* note 10; Human Rights Watch, World Report 1999, *supra* note 10; Strohmeyer, "Collapse," *supra* note 10; Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, Country Reports on Human Rights Practices 1999, *supra* note 10.

¹⁶ SC Res. 1244, UN SCOR, 54th Sess. 4011th mtg., UN Doc. S/RES/1244 (1999).

¹⁷ UN Resolution 1244.

¹⁸ UN Doc. S/2005/635, with Annex, "A comprehensive review of the situation in Kosovo."

B. Establishment of UNMIK

UNMIK was entrusted with a broad mandate, including promotion of the rule of law and human rights.¹⁹ The mission comprises four components (Pillars), each led by a Deputy Special Representative of the Secretary-General (DSRSG). Three international organizations operate under the four pillars.

Pillar I, “Police and Justice,”²⁰ was set up in May 2001 to establish the rule of law, encompassing the police force and the establishment of the judiciary and penal system. This work is directed by the UN. (For the first year of UNMIK’s mandate, Pillar I, was focused on Humanitarian Assistance under the auspices of the UN High Commissioner for Refugees.) Pillar II, “Civil Administration,” is also directed by the UN.²¹ Pillar III, “Democratization and Institution Building,” aims at developing civil society and human rights institutions, media, and political parties. It is led by the OSCE. Pillar IV, “Economic Reconstruction,” is led by the European Union (EU).

The Special Representative of the UN Secretary-General (SRSG) is head of UNMIK and is vested with “maximum civilian execution powers”²² that involve sole executive and legislative authority to “change, repeal, or suspend existing laws to the extent necessary”²³ and “issue legislative acts in the form of regulations.”²⁴ The SRSG also has the authority to appoint and remove any person to the interim civil administration in Kosovo, including the judiciary.²⁵

Besides establishing a civilian administration, Resolution 1244 also established the Kosovo Force (KFOR), a multinational peacekeeping force under NATO command that was charged with ensuring “public safety and order until the international civil presence can take responsibility for this task.”²⁶ KFOR operates within a unified military control and command structure separate from UNMIK.²⁷ As the UN started to take control of the region, retaliation by Albanians against remaining Serbs and perceived Albanian collaborators was widespread. For example, there was a wave of arson against Serb homes throughout the country and widespread harassment by

¹⁹ SC Res. 1244/1999, *supra* note 11, at para. 11.

²⁰ The Police and Justice Pillar (Pillar I) was established in May 2001 as a new Pillar I. At the end of the emergency stage, Pillar I (humanitarian assistance) intended to provide humanitarian aid and facilitating the return of refugees and internally displaced persons, which was led by the Office of the United Nations High Commissioner for Refugees, was phased out in June 2000. The new Pillar I also incorporated the two departments of law enforcement and judicial affairs, which had been part of UNMIK’s Pillar II, Civil Administration.

²¹ The police and judicial components, the Departments of Police and Judicial Affairs (later redesignated as Department of Justice) of the civil administration under Pillar II were transferred to the new Pillar I, Police and Justice, on May 24, 2001.

²² Report of the Secretary-General to the Security Council of June 12, 1999, UN Doc. S/1999/779, at para. 44.

²³ *Id.* at para. 39.

²⁴ *Id.* at para. 41.

²⁵ *Id.* at para. 40.

²⁶ *Id.* at para. 61.

²⁷ The multinational brigades (which initially included NATO forces as well as Russians) fall under a single chain of command under the authority of the KFOR Commander.

Albanians, with strong indications of KLA involvement.²⁸ The situation in the divided northern city of Mitrovica was particularly tense.

Most of the police, prosecutors, and judges in Kosovo were Kosovar Serbs, as Kosovar Albanians had been purged from these positions during the late 1980s and early 1990s. Albanians who remained in their positions under Milosevic after the war were seen as collaborators. The withdrawal created a power vacuum with regards to law enforcement.²⁹ Resolution 1244 offers explicit authority to ensure “public safety and order” and establish “local police forces,”³⁰ but makes no mention of judicial authority. However, re-establishing law and order in the province has been a priority for UNMIK.

In March 2004, Kosovo experienced a violent anti-Serbian riot, the worst interethnic violence since 1999. Instigated by misleading information that Serbs were responsible for the drowning of three young Albanian children,³¹ the riot was initiated to drive Serb, Roma, and Ashkali communities out of Mitrovica. The violence resulted in 21 deaths (split almost equally between Serb and Albanian communities);³² more than 900 injured (more than 20 gravely); over 700 Serb, Ashkali, and Roma homes; up to 10 public buildings, 30 Serbian churches, and two monasteries damaged or destroyed; and 4,500 Kosovar Serbs displaced.³³ The disturbance revealed the continued precarious situation in Kosovo, including its deep-rooted ethnic divisions and continued vulnerability of minority populations, as well as the frustration at lack of progress of the majority population.

II. THE ESTABLISHMENT OF INTERNATIONALIZED TRIBUNALS

A. UNMIK’s Approach on Rule of Law

The creation of hybrid judicial panels in Kosovo was largely a response to urgent needs on the ground. UNMIK’s mandate to maintain peace and security in the territory included a directive to maintain “civil law and order, including establishing local police forces and meanwhile through

²⁸ Human Rights Watch, World Report 1999, *supra* note 10. An international human rights officer in Pec/Peje said that 100 percent of Serb homes in that area were destroyed during this period. Others report that 250,000 Serbs and other minorities were displaced after June 1999. See International Crisis Group, “Finding the Balance,” Sept. 12, 2002, at 3.

²⁹ See Michael E. Hartmann, “International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping,” United States Institute of Peace, Oct. 2003. See also David Marshall and Shelley Inglis, “The Disempowerment of Human Rights–Based Justice in the United Nations Mission in Kosovo,” *Harvard Human Rights J.*, Spring 2003, at 101, available at www.law.harvard.edu/students/orgs/hrj/iss16/marshall.shtml (noting the judicial vacuum from June–December 1999 and the spike of criminal activity it produced, including ethnic violence against Serbs and perceived Albanian collaborators).

³⁰ SC Res. 1244, *supra* note 16, at 9(d), 11(i).

³¹ The investigation into the drowning deaths of two Albanian children in Cabra, led by an international prosecutor, concluded that there was no evidence showing that Serb youths had played part in this accident, although it did not find the cause that led to the children’s drowning. BBC Monitoring Europe, “Probe into drowning of Albanian children in Kosovo completed,” April 28, 2004, and “Body found of third Kosovo boy whose drowning sparked March riots,” June 12, 2004.

³² According to UNMIK’s First Pillar Spokesman Neeraj Singh in April 2004, of the 19 confirmed deaths (at the time) 11 were Albanian and 8 were Serb.

³³ For a detailed discussion of the riot, see Human Rights Watch, “Failure to Protect: Anti-Minority Violence in Kosovo,” March 2004, available at hrw.org/reports/2004/kosovo0704/, and International Crisis Group, “Collapse in Kosovo, Europe Report No. 155,” April 22, 2004, available at www.crisisgroup.org/home/index.cfm?id=3226&l=1.

the deployment of international police personnel to serve in Kosovo.”³⁴ While UN officials interpreted this as a mandate to re-establish the justice sector in general and, in particular, to seek accountability for war crimes and other atrocities committed during and after the conflict, the resolution’s language was vague on this point.³⁵

The task of re-establishing rule of law and criminal justice in Kosovo is shared by the UN and the OSCE. Under the UNMIK structure of Pillar I (Police and Justice), the Department of Justice (DOJ) and UNMIK police have been brought into one administration to maximize coordination of criminal investigations. Mandated primarily to build and oversee the functioning of an independent, impartial, and multi-ethnic judiciary, the DOJ is also responsible for administering the correctional system in Kosovo, ensuring access to justice for all communities and providing assistance and advocacy services for victims. For example, Kosovo’s new police force, the Kosovo Police Service (KPS), has specialized units to provide protection to vulnerable witnesses, to counter human trafficking, and to fight other forms of organized crime.

The work with the local legal community to promote human rights, develop legal capacity, and build legal institutions falls under OSCE’s efforts as Pillar III. In particular, the OSCE established or supported a range of programs and institutions for monitoring and capacity building, particularly the Legal System Monitoring Section (LSMS). It also monitors the justice system. Furthermore, the Criminal Defence Resource Centre (CDRC), a nongovernmental organization (NGO), was established to support the defense; support has been provided for the Kosovo Chamber of Advocates (KCA); the Kosovo Judicial Institute (KJI) was created to train local judges and prosecutors; and the Department of Human Rights and Rule of Law provides assistance in the reform of a variety of legal issues. Responsibility for rebuilding the justice sector and building the capacity of local actors therefore lies with different actors. Pillar I managers did not consider capacity building part of their mandate.

Rebuilding the justice sector is an enormous challenge that is not easily fulfilled.³⁶ Much of the physical infrastructure of the judicial system—court buildings, law libraries, and equipment—were destroyed or severely damaged during the conflict.³⁷ Local lawyers and judges were hard to find; most fled as the Serb forces withdrew, and those who remained generally refused to serve under UNMIK. In addition, few Kosovar Albanians had legal experience, as many were forced out of the judiciary a decade earlier,³⁸ although some kept their practice as defense counsel.³⁹ In addition, law classes were offered only in the Serbian language and the bar exam was offered only in Belgrade,⁴⁰ so the better part of a generation of Albanian lawyers had been lost.

³⁴ SC Res. 1244, *supra* note 16, at 11(i).

³⁵ See interview with UN official, Nov. 2003, noting the vagueness of the Security Council Resolution on issues pertaining to the justice sector, as opposed to the mandate on policing.

³⁶ For an overview of efforts to establish the rule of law in post-conflict Kosovo, see Wendy S. Betts, Scott N. Carlson, and Gregory Gisvold, “The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law,” 22 *Mich. J. Int’l L.* 371, 2001; Jean-Christian Cady and Nicholas Booth, “Internationalized Courts in Kosovo: An UNMIK Perspective,” *Internationalized Courts and Tribunals*, PICT, 2004; Hansjörg Strohmeyer, “Making Multilateral Interventions Work: the United Nations and the Creation of Transitional Justice Systems in Kosovo and East Timor,” *Fletcher For. World Aff.*, 2001; Strohmeyer, “Collapse,” *supra* note 10.

³⁷ Betts, *id.* at 376–377.

³⁸ Strohmeyer, “Collapse,” *supra* note 10, at 53. Some observers also note that the judicial system in place in the past had been an informal and un-transparent form referred to as “telephone justice” (see Hartmann, *supra* note 29, at 5).

³⁹ See “Finding the Balance,” *supra* note 28, at 3.

⁴⁰ *Id.*

Another major issue was the lack of a legal framework. One of the first UNMIK Regulations, 1999/1, declared that the pre-1989 FRY laws, as well as some laws introduced between 1989 and 1999, continued to be applicable,⁴¹ unless they contained an element of ethnic discrimination or otherwise violated standards of international law. The decision to revive the Serbian laws imposed by Milosevic since 1989 offended much of the Albanian population and alienated members of the Albanian legal community, many of whom were familiar only with pre-Milosevic-era legal codes.⁴²

UNMIK was also under pressure because detainees suspected of committing atrocities were crowding prison facilities, with little prospect of a speedy trial. Devastated by the conflict and years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity to conduct such trials, nor were they perceived as able to be independent vis-à-vis Serbs accused of crimes. The ICTY Prosecutor made it clear that the tribunal could try only those who had committed the worst atrocities on the widest scale.⁴³ As the detainees continued to languish in prison, many argued that the continued detention violated international human rights standards. Frustration among the Kosovar Serb population regarding the failure of the judicial process may have contributed to increased ethnic violence.⁴⁴ A combination of the above factors ultimately led to a hunger strike by Serb detainees.

This began to reach a crisis point in December 1999, when the six-month deadline for pretrial detention was approaching for many of the detainees.⁴⁵ The SRSG initially responded by amending the law to allow for one year of pretrial detention, but this did nothing to depopulate the prisons.⁴⁶ Other measures KFOR used included the so-called “COMKFOR hold,” a procedure for extrajudicial detentions used when KFOR authorities believed that the detainee posed a danger to public safety and security.⁴⁷ The SRSG also commenced using so-called “Executive Detentions” that he ordered. Both measures were decried by the OSCE’s LSMS and others as unjustified and in violation of international norms.⁴⁸

B. The Proposed Kosovo War and Ethnic Crimes Court

To address what was rapidly becoming a crisis of justice and accountability, in late 1999 UN and member state officials, as well as the national judiciary, began negotiations for the creation of a

⁴¹ The applicable law before 1989, when Albanians could still practice, was the Criminal Law of the Socialist Autonomy Province of Kosova (from 1977), the Criminal Code of the Socialist Federal Republic of Yugoslavia (July 1, 1977), and the Yugoslav Law on Criminal Procedure (June 30, 1977).

⁴² Betts, *supra* note 36, at 373–374. See also Marshall, *supra* note 29, at 101. Interviews with multiple Kosovar Albanian lawyers.

⁴³ See Carla Del Ponte, Prosecutor of the ICTY, “Statement on the Investigation and Prosecution of Crimes Committed in Kosovo,” The Hague, Sept. 29, 1999.

⁴⁴ See Strohmeyer, “Collapse,” *supra* note 10, at 49. When the UNMIK issued a regulation allowing for longer pre-trial detention of suspects, the OSCE’s Legal System Monitoring Section concluded that the new regulation was a “clear breach” of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). OSCE LMS, “Kosovo: Report No. 6: Extension of Time Limits and the Rights of Detainees: the Unlawfulness of Regulation 1999/26,” April 29, 2000.

⁴⁵ Hartmann, *supra* note 29, at 5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ For a further discussion, see OSCE LSMS, “Review of the Criminal Justice System,” Sept. 2001–Feb. 2002, at 45–51.

standalone criminal court in Kosovo.⁴⁹ The proposed court, referred to as the Kosovo War and Ethnic Crimes Court (KWECC),⁵⁰ was to be an international-led, ad hoc tribunal sitting in Kosovo, but largely modeled on the ICTY.⁵¹ Planning for KWECC, which was never realized, reached an advanced stage. KWECC was to have concurrent, primary jurisdiction with domestic courts of Kosovo over serious violations of international humanitarian law as well as other serious crimes committed on political, ethnic, or religious grounds since January 1, 1998, including: war crimes, genocide, crimes against humanity, and other serious crimes committed on the basis of race, ethnicity, religion, nationality, or association to a minority ethnic or political group. It had no termination date. This means that any serious crime involving any ethnic minority could be included in its subject matter jurisdiction.⁵² While KWECC would have simultaneous jurisdiction with the ICTY,⁵³ the tribunal would have primacy and KWECC was to focus on the lower-profile offenders that the ICTY lacked the capacity to try.⁵⁴

According to the proposal, KWECC would have panels composed of international and local judges.⁵⁵ KWECC was to be staffed by multiethnic national and international judges, prosecutors, and staff. The president was to be an international judge. Local staff, including judges, prosecutors, and other personnel, were to be provided by the Department of Judicial Affairs.⁵⁶ It was assumed that international judicial personnel, such as judges and prosecutors, would be seconded by donor countries or organizations.⁵⁷ In addition, a Witness Protection Unit and an Office for the Defence were to be established.⁵⁸ KWECC was expected to be functional in the summer of 2000, and an appointed chief, Fernando Castanon, had already arrived in Kosovo.⁵⁹ After SRSB Bernard Kouchner signed the regulation, the process of appointing the president and other international and local judges began.

⁴⁹ In its first report of December 13, 1999, the Technical Advisory Commission (TAC) on Judiciary and Prosecution Service, which was established pursuant to UNMIK Regulation No 1999/6 of September 7, 1999, and composed of both Kosovar and international experts, recommended the establishment of such a tribunal. Strohmeyer, "Multilateral Interventions," supra note 36, at 119. The international and local Kosovar legal members of the TAC voted unanimously to create such a court. US Mission to Kosovo, "Kosovo Judicial Assessment Mission Report," April 2000, at 20, available at pristina.usmission.gov/jud.pdf.

⁵⁰ The name originally proposed was Kosovo Tribunal for War Crimes and Crimes Against Humanity, but it was later renamed KWECC.

⁵¹ The international and local Kosovar legal members of the TAC voted unanimously to create such a court. Kosovo Judicial Assessment Mission Report, supra note 49, at 20.

⁵² US, US Mission to Kosovo (2000).

⁵³ Strohmeyer, "Multilateral Interventions," supra note 36, at 119.

⁵⁴ Id.

⁵⁵ UNMIK, "Kosovo: Reconstruction 2000," April 2000, available at www.seerecon.org/kosovo/documents/reconstruction2000/index.html.

⁵⁶ UNMIK Press Release, "Tense Atmosphere at Joint Meeting of IAC and KTC: Hague Tribunal and War Crimes Court to Work Together," June 3, 2000, available at www.unmikonline.org/press/mon/Imm030600.html.

⁵⁷ Id.

⁵⁸ This project included costs for security as well as an amount for start-up services and goods, such as metal detectors, computers, armored vehicles, and court and office equipment. See "Kosovo: Reconstruction 2000," supra note 55.

⁵⁹ UNMIK Press Release, supra note 56.

The concept of KWECC gave rise to some concerns among the Kosovar Albanian legal community about the potential drain it might cause to the fledging Kosovar judicial system,⁶⁰ and the potential complications of having an additional judicial layer between the domestic system and the ICTY.⁶¹ Conversely, the Kosovar Bar was skeptical of an international tribunal that might be less likely to employ local lawyers. Some of those with ties to the political parties feared a system that was “too independent” and thus more likely to pursue Albanians for war crimes. There were also fears that KWECC would exacerbate ethnic tensions.⁶²

In September 2000, the idea of KWECC was abandoned.⁶³ Member states had become increasingly concerned about the cost of a freestanding court⁶⁴ and feared that it would be impossible to provide the necessary security.⁶⁵ One American diplomat called this a “classic clash between UN idealism and U.S. cynicism,”⁶⁶ as the UN refused to provide projected costs and the United States refused to house the court within its high-security base. Some of those involved believe that an additional, if not primary, hurdle was U.S. concern that an independent court might investigate war crimes committed by NATO forces, a controversial subject during the time of these negotiations.⁶⁷ In retrospect, Albanian lawyers regret that a more independent court did not emerge, because of concerns about the SRSG’s influence over the system that did develop (see below).⁶⁸ Ultimately, the international judges and prosecutors program, once it started to function in September 2000, was the final “nail in the coffin” that led to the abandonment of KWECC.⁶⁹

III. THE ESTABLISHMENT OF THE INTERNATIONALIZED PANELS

Simultaneously to planning for KWECC, UN authorities also set up an interim program to bolster trust in the judiciary by taking controversial cases out of the hands of Serb or Albanian judges without building a new international court. A wave of violence in Mitrovica in February 2000, sparked by the bombing of a local café and a rocket attack against a UNHCR bus carrying Serbs, prompted this action.⁷⁰ UNMIK police arrested several Kosovar Albanian suspects for

⁶⁰ Some UNMIK officials argued that docket-pressure would force KWECC to be discretionary, and it would be empowered to develop its own internal criteria for choosing cases. “Kosovo Judicial Assessment Mission Report,” *supra* note 49, at 21.

⁶¹ John Cerone and Clive Baldwin, “Explaining and Evaluating the UNMIK Court System,” in André Nollkaemper Romano and Jann K. Kleffner et al., *Internationalized Criminal Courts*, December 2004.

⁶² Michael A. Newton, “War Crimes Research Symposium: ‘The Role of Justice in Building Peace’: ‘A View from the Trenches’: The Military Role in the Pursuit of Justice,” *Case Western Reserve J. Int’l L.*, Spring 2003, n. 100.

⁶³ Interview with OSCE official, Nov. 2003; Cady, *supra* note 36, at 52.

⁶⁴ The start-up cost of the court for six months was estimated to be DM 12.59 million. The cost of establishing the detention facility and operating it for six months was estimated at DM 1.17 million. “Kosovo: Reconstruction 2000,” *supra* note 55.

⁶⁵ *Id.* See also Frederick Lorenz, “Establishing the Rule of Law in Kosovo: The UN Mission,” REECAS Newsletter, University of Washington, Spring 2001, available at depts.washington.edu/reecas/newsletter/spring01/spr_news.pdf. Interview with UNMIK official, Nov. 2003; interview with OSCE official, Nov. 2003; Strohmeyer, “Multilateral Interventions,” *supra* note 36, at 119.

⁶⁶ Interview with senior U.S. official.

⁶⁷ Interviews with senior U.S. official, UN official, and civil-society observers.

⁶⁸ Multiple interviews with Albanian lawyers. Serb lawyers were less supportive of KWECC because the need for international intervention in Serb areas was so immediate.

⁶⁹ Betts, *supra* note 36, at 381.

⁷⁰ Interview with OSCE official, Nov. 2003.

brandishing weapons, but a Kosovar Albanian judge released them. The outbreak of violence led the SRSJ to re-evaluate the judiciary situation.

In part as a result of this event, the UN recognized the need for ethnically neutral judges and prosecutors to hear cases. With virtually no consultation with the local population—indeed, even an Albanian lawyer in a senior UN post noted that she was not included in the decision-making process⁷¹—on February 15, 2000, the UN issued UNMIK Regulation 2000/6. This provided for the appointment of an international judge and an international prosecutor to work within the existing domestic judiciary along with their local counterparts. The Regulation gave the SRSJ the power to make such appointments, and by February 17, 2000, the first IJ and IP were in place.⁷²

Initially, this arrangement was meant only for the Mitrovica District Court and other courts within its territorial jurisdiction (e.g., Municipal and Minor Offences Courts in Mitrovica). However, a number of Serb and other minority (mostly Roma) detainees initiated hunger strikes to protest their prolonged pretrial detention.⁷³ In addition, UNMIK realized that the problem of Kosovar Albanian judges' lack of perceived impartiality was a general issue. As a result, the introduction of IJPs was subsequently extended to cover courts throughout Kosovo, including the Supreme Court, by means of Regulation 2000/34 in May 2000.⁷⁴ By the summer of 2000, six IJs and two IPs were appointed to serve in mixed panels in the courts of Mitrovica, Pristina, Gnjilane, and Prizren.⁷⁵

While KWECC was conceived as an independent transitional justice mechanism to boost the rule of law, the temporary introduction of IJs was motivated primarily by pragmatic and immediate security needs. The hope was that the infusion of foreign experts would jump-start the judicial reform process, providing badly needed capacity and independence.⁷⁶ Despite the lack of consultation with the local population, many welcomed the appointment of IJs because it made it possible for trials to proceed in the Kosovo courts without a grave risk of bias or “violent blowback.”⁷⁷

At the end of 2000, UN authorities made further revisions to the regulations allowing for the appointment of IJs and IPs. The OSCE and NGOs had criticized Regulations 2000/6 and 2000/34 because, while they did assure a measure of impartiality, they did not go far enough. Specifically, they did not ensure a majority of IJs in a given case (e.g., one international judge on a panel of three) and thus were “insufficient to remedy the lack of an objective appearance of impartiality in

⁷¹ Interview with ethnic Albanian lawyer who formerly held senior post in UNMIK Department of Justice, Nov. 2003.

⁷² UNMIK Regulation 2000/6, on the Appointment and Removal from Office of International Judges and Prosecutors, Feb. 15, 2000; see OSCE LSMS, “Kosovo’s War Crimes Trials: A Review,” Sept. 2002, at 11; Press Releases UNMIK PR/159 and UNMIK/PR/161, available at www.unmikonline.org.

⁷³ UNMIK, “Pillar I: Police and Justice,” June 2004, available at www.unmikonline.org/justice/documents/PillarI_Report_June04.pdf, at 14.

⁷⁴ UNMIK Regulation 2000/34, Amending UNMIK Regulation 2000/6, On the Appointment and Removal from Office of International Judges and Prosecutors, May 27, 2000.

⁷⁵ Cady, *supra* note 36, at 52.

⁷⁶ OSCE Report Sept. 2002, *supra* note 72, at 11.

⁷⁷ Interview with international NGO representative from Criminal Defense Resource Center, Nov. 2003; see also interview with local Albanian lawyer, Nov. 2003.

trials involving allegations of serious war crimes.”⁷⁸ Indeed, in practice IJs were often outvoted by the lay and professional Kosovar judges, leading to unsubstantiated verdicts of guilt against some Serbian defendants and questionable verdicts of acquittal against some ethnic Albanian defendants.⁷⁹ In addition, Kosovar Albanian prosecutors were accused of initiating criminal investigations and proposing detentions of Serbs based on insufficient evidence, while abandoning cases and refusing to investigate ethnic Albanians.⁸⁰ In addition, because of the large volume of cases, IJs were spread too thin. As a result, cases were often tried before panels of varying composition, some with no IJs. Ultimately, many of these early verdicts in war crimes cases were overturned on appeal and sent for retrial.⁸¹

Responding to these concerns, the UN in December 2000 promulgated UNMIK Regulation 2000/64.⁸² This grants the SRSJ the authority to appoint a special panel of three judges with international majority, the so-called “Reg. 64 panel,” as well as the authority to assign IPs.⁸³ Consequently, a special section, the International Judicial Support Section (IJSS), was established within the DOJ⁸⁴ in order to support this initiative. Although the IJSS initially supported both IJs and IPs, subsequently the IPs were supported by a newly created Criminal Division. With the advent of the “Reg. 64 panels,” which are international only, the mixed panel formation of Regulation 6 was virtually abandoned.

A. Trigger Mechanisms for Regulation 64 Panels

Regulation 2000/64 continues in force in Kosovo today. Trigger mechanisms for a so-called “Reg. 64 panel” include appointment by the SRSJ on his own motion, or upon the request of prosecutors, the accused, or defense counsel where “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.”⁸⁵ Although no clear criteria have been laid out in the Regulation, in practice the primary reasons for relying on IJs are either fears about perception of bias or concerns about intimidation of local judges.⁸⁶ As a result, IJPs were used mainly in cases involving interethnic conflict.⁸⁷ In such cases, the DOJ makes a recommendation to the SRSJ, who takes the formal decision to assign a prosecutor or a panel of majority of IJs to a specific case. Parties who request a Reg. 64 panel therefore make their request

⁷⁸ OSCE Report Sept. 2002, supra note 72, at 11. Under the applicable law in Kosovo at the time, serious crimes were to be heard by two professional and three lay judges; thus, the appointment of even two professional IJs would not ensure a majority of internationals.

⁷⁹ Hartmann, supra note 29, at 10.

⁸⁰ Id.

⁸¹ OSCE Report Sept. 2002, supra note 72, at 11.

⁸² UNMIK Regulation 2000/64, On the Assignment of International Judges/Prosecutors and/or Change of Venue, Dec. 15, 2000. The Regulation was initially enacted for a 12-month period, but was subsequently extended by UNMIK Regulations 2001/34 and 2002/20. For a further discussion regarding UNMIK Regulation 2000/64, see the OSCE LSMS, “Review of the Criminal Justice System,” supra note 48, at 75.

⁸³ It is worth noting that UNMIK Regulation 2000/6 gives IPs and IJs the right to select and take responsibility for cases they deem appropriate for the international judiciary. The difference is that when the SRSJ appoints a Reg. 64 judicial panel, the entire panel can be international, while in practice, a Regulation 6 panel is either one or two international judges out of three. With respect to IPs, Reg. 64 hardly ever is used, as IPs routinely take over cases under Regulation 2000/6.

⁸⁴ DOJ currently comprises five sections: the Judicial Development Division (JDD), the International Judicial Support Division (IJSJ), the Criminal Division (CD), the Penal Management Division (PMD), and Office for Missing Persons and Forensics (OMPF).

⁸⁵ Id.

⁸⁶ Interview with UNMIK official, Nov. 2003.

⁸⁷ Interview with national judge, Nov. 2003.

to the DOJ, which forwards it to the SRSG. International prosecutors and judges may also take cases at their own discretion.⁸⁸ (The March 2004 riots ushered in a new period in which local judges also heard cases involving ethnic conflict.⁸⁹)

Appointing a Reg. 64 panel may take place at any stage in the proceedings, except where the trial is in session or if an appeal has already commenced. It was felt that this would be unduly disruptive to the conduct of proceedings, and that any bias emerging at this stage could be cured by the assignment of an international panel to hear an appeal or an extraordinary legal remedy against appeal. Even so, it is a far-reaching power that has led to some resentment from the local professionals whose cases have been removed, sometimes in an overtly demonstrative manner.

IJs sit as judges on the regular courts of Kosovo and IPs work as national prosecutors, both applying the same domestic law as their local counterparts.⁹⁰ However, IJs do not receive case assignments from the president of the court in which they sit. Rather, they receive assignments from the DOJ or can petition to take the case under Regulation 2000/6 or 2000/64. In practice, the IJPs function *de facto* as a parallel judicial process for cases that the DOJ or IJPs themselves deem inappropriate for their national counterparts.

B. International Judges Program

By December 15, 2000, there were 10 IJs in Kosovo.⁹¹ During 2001, the number of IJs fluctuated, but reached as many as 17.⁹² Currently, there are slots for 17 IJs, although as of September 2005, only 14 slots were filled, and in November there were only 11 or 12.⁹³ In early 2005 the post of Chief International Judge, which has both administrative and legal responsibilities, was created. This post was created partly to relieve the Director of the DOJ from tasks affecting the appearance of judicial independence.

It has not been easy to fill existing slots.⁹⁴ UNMIK authorities post announcements through the UN, and applications are sent to the personnel office at UNMIK. The Chief International Judge reviews the applications and draws up a short list for interviews. All candidates are interviewed via telephone, typically by two existing IJs, the head of the International Judicial Support Section (IJSD), and a representative of UNMIK's personnel office. This system has been criticized for being haphazard and for the difficulty in exercising quality control at such a distance. Most of the applications come from Africa, Asia, or Eastern Europe, because it has proven difficult for judges in the North America and Western Europe to take leaves of absence from their regular judicial

⁸⁸ Almut Schröder, "Strengthening the Rule of Law in Kosovo and Bosnia and Herzegovina: The Contribution of International Judges and Prosecutors," Center for International Peace Operations, Berlin, Germany, April 2005.

⁸⁹ See the account of the handling of the March riot cases in OSCE LSMS, "Review of the Criminal Justice System," *supra* note 2.

⁹⁰ Cady, *supra* note 36, at 53 (citing Official Gazette of the Socialist Autonomous Province of Kosovo No. 21/78).

⁹¹ Hartmann, *supra* note 29, at 12.

⁹² *Id.*

⁹³ There is currently a Chief International Judge; IJs are serving in the Supreme Court of Kosovo; and a number of IJs were serving in Kosovo's Criminal Justice System at the District Court Level and also at the Municipal Court level. By comparison, after the appointment on December 4, 2003, of 26 new national judges, the rest of the judiciary has 316 national judges, 90 percent of whom are Albanian, 5 percent Serb, and 5 percent from other minority groups. See S/2004/262, "Letter dated 30 March 2004 addressed to the President of the Security Council by the Secretary General."

⁹⁴ Interview with UNMIK official, Nov. 2003.

duties to serve in Kosovo. Some special bilateral arrangements have been made, such as with the state of Minnesota, which resulted in a number of judges from there taking up office. Judges are not formally nominated by member states, nor are personnel seconded to UNMIK-DOJ from member states or other institutions. All IJPs are officially chosen, hired, and paid by UNMIK.

Difficulties in recruiting quality personnel stem from several factors. Of the international judges that were appointed between 1999 and 2001, few had conducted trials involving serious criminal offenses and none had any practical experience in, or knowledge of, international humanitarian law prior to their appointment.⁹⁵ For example, one of the international judges had experience exclusively in riparian rights. Also, most judges are unfamiliar with the Kosovar legal framework, which is a unique blend of civil and common law.⁹⁶ Furthermore, the ad hoc arrangement of recruiting and assigning international judges and prosecutors, who are appointed on six-month contracts, makes it difficult to find qualified personnel who are available when needed. The UN does not maintain a roster of potential candidates for judicial positions in international or hybrid courts, and some argue that such a list would help, or that a permanent pool of judges should be established.⁹⁷ In addition, concern for personal security or other practical factors may be cited as deterring good applicants. For example, many internationals may have to get used to closed protection and other security inhibitions.

International judges and prosecutors are paid under the UN professional salary scale commensurate with their experience. Their salaries are paid by the UN, not from Kosovo's Consolidated Budget. IJPs are generally hired at the P3, P4, or P5 level. Initially, many were hired as or promoted to D1 levels, but the office has scaled back this practice. Recently, the Chief Judge post has been categorized at the D1 level. As is usual with hybrid tribunals, the salaries of IJPs vastly exceed that of their local counterparts.⁹⁸ While a P5 in the UN system may earn more than US\$100,000 plus daily subsistence allowance of another \$350 a day, an average District Court judge in Kosovo will be paid around 350 Euros, with the Head of the Supreme Court earning about 550 Euros per month. Also, the local judges do not receive many benefits. One judge had been ill for eight months but got only two weeks of paid sick leave. Another Supreme Court judge said his pension payments would be as little as 40 Euros a month.

The lack of adequate training for IJPs is notable. Except for a brief induction course on basic information for living in Kosovo, international judges do not undergo training on the Kosovar legal system before assuming their positions. There is no pre-entry training on humanitarian law, criminal procedure, or the criminal code of the Federal Republic of Yugoslavia.⁹⁹ In September 2000, the ICTY held a training session in Kosovo on humanitarian law for both judges and prosecutors, but this has not become a regular feature. Part of the difficulty stems from the fact that the average tenure of the IJs is so brief. Typically, IJs take a few months to become familiar with the system, and then may hear only one or two complex cases before departing. Due to the

⁹⁵ Marshall, *supra* note 29, at 129.

⁹⁶ UNMIK Regulation 2001/2, January 12, 2001, in Section 2, lists the criteria for international judges and prosecutors as follows: International judges and international prosecutors shall: (a) have a university degree in law; (b) have been appointed and have served, for a minimum of 5 years, as a judge or prosecutor in their respective home country; (c) be of high moral integrity; and (d) not have a criminal record.

⁹⁷ See, e.g., Cesare Romano, "The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals," in Romano et al., *supra* note 61, at 252–259.

⁹⁸ American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI), *Judicial Reform Index For Kosovo*, Vol. I, April 2002, at 27, available at www.abanet.org/ceeli/publications/jri/jri_kosovo.pdf.

⁹⁹ Marshall, *supra* note 29, at 129.

short contracts, IJs have been known to leave the mission without finishing an ongoing case, resulting in delays due to the need to restart the trial.¹⁰⁰

UNMIK has generally suffered from a shortage of translators to work on legal texts. This has caused delay in the trials. Usually international and local judges can talk to each other or conduct legal discussions only through interpreters. Many IJPs and local jurists feel that the quality of translation continues to be a major problem, as many translators and interpreters are not specialized in legal issues. IJs often make decisions without a precise knowledge of the exact wording used in the lower court's decision.¹⁰¹

National judges generally agree that there are important reasons for IJs to deal with sensitive cases.¹⁰² However, some have complained that they are not sufficiently involved in making decisions about overall case allocation.¹⁰³ Moreover, because Regulation 2000/64 gives broad discretion to appoint IJs in a wide array of circumstances, the appointment of the IJs sometimes seemed arbitrary and ad hoc.¹⁰⁴ This aspect of the process has been subject to repeated criticism by OSCE and others, but no changes were made.¹⁰⁵ In some instances, internationals have been assigned to cases that are not serious and do not require their involvement, such as traffic accidents involving UNMIK officials or illegal woodcutting. No directive explicitly guides this decision-making process, and the deployment of IJPs has not always been strategic.

National judges and lawyers give a mixed assessment of the IJs. While many say that most of the IJs are competent,¹⁰⁶ allegedly some are not. Local judges note that some IJs have not served as judges before.¹⁰⁷ Misunderstanding and friction can arise between international and local jurists and may be aggravated by the lack of communication due to the absence of a common working language at the courts.¹⁰⁸ International jurists normally do not speak the local languages, while the vast majority of local jurists and police do not speak English. National jurists have faulted the IJs for insufficient understanding of local law, in particular sentencing rules and the use of precedents,¹⁰⁹ a concern reiterated by international monitors. Some have also complained that internationals tend to prolong the trials.

While national judges and lawyers report generally collegial relations with the IJs, many would like more interaction, both informally and with respect to the substance of cases.¹¹⁰ Indeed, with some exceptions—such as the District Court at Mitrovica and the Supreme Court—the offices of the IJs and IPJs are usually in separate buildings from the national judges. In some locations, such

¹⁰⁰ This happened in the case against Sali Veseli et al., also known as “Commander Drini,” in Prizren. When the IJ left the mission before concluding the case, it had to be restarted.

¹⁰¹ In most cases the jurists are provided with English summaries of the files and, at their request, translations of certain documents.

¹⁰² Interviews with national judges, Nov. 2003.

¹⁰³ *Id.*

¹⁰⁴ *Id.*, interview with UNMIK official, Nov. 2003.

¹⁰⁵ OSCE LSMS, Review of the Criminal Justice System, *supra* note 48, at 29–30.

¹⁰⁶ See, e.g., interview with Albanian defense lawyer, Nov. 2003; interview with Albanian judge, Nov. 2003.

¹⁰⁷ Interviews with ethnic Albanian lawyers, Nov. 2003.

¹⁰⁸ Schröder, *supra* note 88, at 21.

¹⁰⁹ Interview with Albanian lawyer, Nov. 2003 (describing case in which the judge mistakenly thought the maximum punishment was 20 years but it was less than 15 years under the applicable Yugoslav code); interviews with Albanian judges, Nov. 2003.

¹¹⁰ Interview with Albanian national judge, Nov. 2003 (describing relations with IJs as “good” and “collegial”); interview with Albanian national judge, Nov. 2003.

as Pec/Peje, there were regular meetings between the international and national judges, but this is rare.¹¹¹ In some trials, IJs have interacted with their national counterparts for only a few minutes before trial.¹¹² National judges and lawyers also described some of the IJs as arrogant,¹¹³ and claim that some are not willing to learn from the national judges.¹¹⁴ They also note that some IJs do not appreciate the strength of the local legal talent.¹¹⁵ In addition, while some national judges say they have learned and benefited from the exchange and interaction with the IJs,¹¹⁶ IJs have generally not assumed a mentoring role. IJs maintain that they lack the time for mentoring, and note that it is not part of their job description. The degree of interactions therefore depends on personalities.¹¹⁷ Now that all judges have been recently relocated to Pristina, such occasions may become more limited as they no longer have the interaction with colleagues throughout the provinces.

In short, the presence of international judges and prosecutions may have helped to minimize a perception of bias and partiality in the judiciary,¹¹⁸ but this task has not been easy in the ethnically divided Kosovo.¹¹⁹

C. International Prosecutors

By December 15, 2000, there were three IPs in Kosovo. In August 2001, the first IP was appointed to the Office of Public Prosecutor in Kosovo, bringing the total number of IPs to six. During 2001, the number of IPs grew to 11.¹²⁰ In late 2005, there were about nine IPs left in Kosovo. The process of recruitment and selection is similar to that for the IJs, and turnover rates are similarly high.¹²¹ Difficulties in recruiting quality staff are similar to that of IJPs, although on average the quality may be slightly higher. Interaction among IPs and national prosecutors (NPs) is usually superficial. This is partly because IPs tend to work alone and cases are not shared between local and international prosecutors, and also because IPs are not required to take on a mentoring role.¹²² Many feel that joint teams of national and international prosecutors would have been a good idea,¹²³ but time constraints and security concerns have been held to prohibit this.¹²⁴ In addition, many of the cases are simple and do not warrant a multiple-member team. Sometimes

¹¹¹ Interview with IJ, New York, Oct. 2004.

¹¹² Interview with Albanian judge and lawyer, Nov. 2003.

¹¹³ *Id.*; interview with OSCE official, Nov. 2003.

¹¹⁴ *Id.*

¹¹⁵ Interview with UNMIK official, Nov. 2003.

¹¹⁶ Interview with Albanian judge, Nov. 2003 (praising the “exchange of experience and professional styles on the mixed panels, because the practice of different countries provides illustrative contrasts” and noting that “this sets a new, more democratic tone for our courts that used to be quite autocratic”).

¹¹⁷ Interview with UNMIK official, Nov. 2003.

¹¹⁸ See, e.g., “Kosovo’s War Crimes Trials,” *supra* note 72, at 10; Cerone, *supra* note 61.

¹¹⁹ For discussion on the ethnic hostility in Kosovo, see, e.g., International Crisis Group, “Collapse in Kosovo,” *supra* note 33, and “Kosovo: Toward Final Status, Europe Report No. 161,” Jan. 24, 2005. The latter report observes, “for Kosovars, Serb guilt for war crimes remains collective, not individual,” and the report notes that west Kosovo is much more difficult environment than east Kosovo, which experienced little fighting (7–8).

¹²⁰ Hartmann, *supra* note 29, at 12.

¹²¹ *Id.*

¹²² See, e.g., interview with UNMIK official, Nov. 2003; interview with OSCE official, Nov. 2003; interview with Albanian lawyer, Nov. 2003.

¹²³ Interview with Serb defense lawyer, Nov. 2003; interview with IP, Nov. 2003 (noting that there is “lack of meaningful discourse” between international and national legal communities); interview with international NGO representative, Nov. 2003.

¹²⁴ Interview with IP, Nov. 2003.

a case will be assigned to a national prosecutor with an IP monitor, but this is rare.¹²⁵ Compounding the problem is the fact that for a long time UNMIK had no nationals employed in the Criminal Division.¹²⁶ An additional factor is the legacy of communism, which purportedly causes nationals to be too deferential. Resentment may also arise when IPs take over cases from local prosecutors.¹²⁷

IV. PROSECUTORIAL STRATEGY AND ISSUES OF CASE SELECTION

A. Lack of Criteria for Referral

What distinguishes Reg. 64 panels from other systems involving international judges and prosecutors is their broad discretion to take on any national pending cases. The lack of clear direction in terms of where to concentrate internationals remains an issue of great controversy and criticism. As mentioned, the SRSG can approve a Reg. 64 panel for any case—from war crimes to petty theft—if it is deemed “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.”¹²⁸ Using this rationale, the IJPs initially focused on indictments of war crimes against Serbs, partly because of the large number of Serbs in detention when internationals arrived. They inherited 43 such cases that had commenced before local panels of Albanian judges.¹²⁹ The IJPs also took on war crimes cases against Kosovar Albanians, most notably the *Llapi* case, which involved high-profile former KLA leaders.¹³⁰

However, gradually the focus shifted from cases deemed inappropriate for local judges and prosecutors to cases that local judges and prosecutors did not want to try because of security concerns or other political pressures. The IJPs’ primary focus is now organized crime and corruption cases.¹³¹ As one IP noted, these categories of cases are often interrelated, because criminal power structures, including organized crime, are also involved in terrorism and interethnic violence.¹³² On the other hand, organized crime is a regular feature not only of many other post-conflict contexts, but also of other Eastern European States. Some complain that the shift in focus represents European and American, rather than local, priorities.¹³³ (The IJPs have also handled a number of cases involving UN personnel.)¹³⁴

B. Concerns Regarding Independence

A major criticism of the IJP system has been that its structure gives the SRSG the ultimate executive power to appoint international judges and prosecutors and choose cases in which they are to be involved. Moreover, UNMIK’s DOJ is the supervising authority over international

¹²⁵ Interview with UNMIK official, Nov. 2003.

¹²⁶ It should be noted that in the past year around 50 have been hired in other parts of the DOJ.

¹²⁷ Gregory L. Naarden and Jeffrey B. Locke, “Note and Comment: Peacekeeping and Prosecutorial Policy: Lessons from Kosovo,” *American J. Int’l Law*, Oct. 2004, at 729. Competencies of local prosecutors are outlined in the Law on Public Prosecutor Office, OFFICIAL GAZETTE No. 32/76, 1988 (Kosovo).

¹²⁸ UNMIK/Reg/2000/64 at 1.2, “On Assignment Of International Judges/Prosecutors And/Or Change Of Venue,” Dec. 15, 2000.

¹²⁹ Interview with UNMIK official, Nov. 2003.

¹³⁰ Interviews with 2 UNMIK officials, Nov. 2003.

¹³¹ Interview with UNMIK official, Nov. 2003; see also interview with Albanian judge, Nov. 2003, who noted that while IJP handling of organized crime cases has been helpful, more war crimes cases must be pursued; interview with UNMIK official, Nov. 2003.

¹³² Hartmann, *supra* note 29, at 12.

¹³³ Interviews with State Department and former UNMIK officials.

¹³⁴ Interview with Serb defense lawyer, Nov. 2003, who defended one such case.

judges and prosecutors, extending their contracts. International judges are not subject to the Kosovo Judicial and Prosecutorial Council (KJPC), the body that appoints and disciplines local judges, and there is no local involvement in the oversight of IJPs. In its *Review of the Criminal Justice System*, the OSCE LSMS stated, “the very short contractual periods for international judges and prosecutors, and the fact that each extension of these contracts is solely dependent on UNMIK’s executive branches—DOJ and, ultimately, SRSG—create an appearance of executive control over these officials.”¹³⁵ The LSMS recommended that, to ensure independence, decisions on hiring an extension of IJPs should be under the auspices of an empowered KJPC. This recommendation was never implemented, and international judges and prosecutors are seen as subject to the UN supervising executive power.¹³⁶ This appearance of lack of independence has led many to question the impartiality of the hybrid process.

Among the war crimes and interethnic cases that constitute the bulk of the IJP caseload to date, the primary controversy has been whether the SRSG’s and DOJ’s selection of cases has been politically biased. Many observers, including both Kosovars and internationals,¹³⁷ believe the UNMIK executive exerts too much influence on the criminal justice process. Regardless of whether it is justified, there is a local perception that political interference has disproportionately protected potential Serb defendants, and many allege that UNMIK has a pattern of “caving in” to Serb demands. Some argue that many cases initially brought against Serbs before local panels resulted in dramatically reduced charges, sentences, or acquittals when the IJPs took over.¹³⁸

Furthermore, some Kosovar Albanians perceive a systemic bias on two fronts.¹³⁹ First, Serbia is a nation, while Kosovo is not, and Albanians fear that UN officials feel more comfortable in the diplomacy with Serbia. Second, some Albanians believe that UNMIK’s aversion to threats against stability has given radical Serbs an effective veto over UN policies, including prosecutions.¹⁴⁰

DOJ officials have asserted that case selection is not political. As one put it, “We would never consider ethnic balance in deciding which cases to pursue or how the decisions are handed down. The only question is whether there is a prosecutable case. The SRSG exerts no influence.”¹⁴¹ The DOJ identifies the limiting factors in prosecutions not as political, but as the lack of support for witness protection and weak extradition options.¹⁴²

¹³⁵ OSCE LSMS, “Review of the Justice System,” supra note 48, at 26.

¹³⁶ Cerone, supra note 61.

¹³⁷ Interview with Albanian national judge, Nov. 2003; interview with Albanian lawyer, Nov. 2003; interviews with 2 Albanian lawyers, Nov. 2003; interview with Albanian newspaper editor, Nov. 2003; interview with NGO representative, Nov. 2003.

¹³⁸ See OSCE Report, supra note 72, at 12–28 (summarizing cases); see also interview with UNMIK official, Nov. 2003.

¹³⁹ A smaller number of Albanians charged UNMIK and DOJ with outright ethnic bias, citing the disrespect with which internationals treat them.

¹⁴⁰ The examples most often cited are the escapes of large number of Serb detainees under what are considered dubious circumstances, the low number of successful war crimes prosecutions against Serbs, the failure to prosecute the “Bridge Watchers” (at least until they injured internationals), and the inability or unwillingness to push for extradition of key Serb suspects hiding in Serbia. These examples, along with perceived discrepancies in sentencing (see below) are reported continually in the local news. Interview with Albanian newspaper editor, Nov. 2003.

¹⁴¹ Interview with UNMIK official, Nov. 2003.

¹⁴² Interview with UNMIK official, Nov. 2003.

C. Lack of Cooperation by Serbia

Many of those who had committed atrocities in 1999, including Serbs and Kosovar Serbs, retreated into Serbia when the conflict was over. Many remain at large in Serbia and Montenegro as well as other countries in Europe. As one IP noted, “We have not been able to convict some key people—those who escaped, those we indicted and could not arrest, and those we have not indicted. These matter to people here, particularly because there are so few successful prosecutions of Serbs that we can point to.”¹⁴³ Moreover, the perception is that more is done to bring Albanians to trial than Serbs.

Extradition has been difficult to negotiate, partly because Kosovo is a UN protectorate and not an independent state.¹⁴⁴ UNMIK, in accordance with its *sui generis* status, negotiates and enters into bilateral agreement with states on the two-way transfer (extradition) of foreign nationals and Kosovo residents. These negotiations are complicated by internal Serbian politics, including the recent success of more nationalistic candidates and the continuing problem of missing Kosovar Albanians believed to be held in Serbia. Presumably some of these issues will form part of Kosovo’s final status determination.

D. Structural Adjustments to the IJP System

There have been some attempts to put a more deliberate and centralized structure into the IJP program to allow for more strategic deployment. In March 2003, a Criminal Division was established. A Chief International Judge and Prosecutor were put in place, all answerable to the DOJ.¹⁴⁵ The Head of the Criminal Division monitors developments of all cases, determines the importance of each case, and devises proceeding measures with the IP. The Criminal Division, which was composed exclusively of IPs and international lawyers supporting the prosecutors, worked in parallel to domestic prosecutorial services.¹⁴⁶

Further steps were taken in 2005 to establish the Kosovo Special Prosecutor’s Office (KSPO). As of September 2005, funding had been secured from the European Agency for Reconstruction, vacancy notices had been drafted, and a draft Regulation establishing the KSPC was being revised by UNMIK’s Office of Legal Affairs (OLA) and the DOJ in late 2005. The KSPC will fall within the Office of the Public Prosecutor. The proposal is that the KSPO’s mandate will include taking over the high-profile cases that the Criminal Division currently covers. It will begin with two or three local prosecutors and will expand until it reaches full strength. Initially there will be a number of IPs assigned to the KSPO, which will provide on-the-job training. As the KSPO increases in size and ability, local prosecutors in the unit will begin to train other local prosecutors in other offices throughout Kosovo. Simultaneously, international judges have relocated to Pristina but will be allowed to try cases from around the country from there (the so-called “single jurisdiction” approach). It remains to be seen what the impact of these measures will be in terms of refocusing strategic direction and capacity building.

¹⁴³ Interview with IP, Nov. 2003.

¹⁴⁴ Interview with UNMIK official, Nov. 2003.

¹⁴⁵ The IP must obtain the consent of the division’s head prior to filing an indictment or appeal. Naarden, *supra* note 127, at 732.

¹⁴⁶ *Id.*

V. LEGAL FRAMEWORK

The applicable law in Kosovo constitutes a blend of UNMIK regulations, including the Constitutional Framework¹⁴⁷ and domestic laws. As mentioned above, initially the UNMIK authorities declared the applicable law in Kosovo to be Federal Republic of Yugoslavia Serbian law, modified to conform to international human rights standards.¹⁴⁸ This decision outraged many Kosovar Albanians, who refused to apply the law, resulting in widespread confusion.¹⁴⁹ In response, UNMIK issued new resolutions describing the applicable law to be the law in force in Kosovo prior to March 22, 1989, insofar as it is not in conflict with international human rights standards.¹⁵⁰ The European Convention on Human Rights is directly applicable in Kosovo and is applied increasingly both by IJs and local judges (although some international practitioners have commented that the local practitioners will simply reference such provisions rather than reason their citation).

The jurisdiction of the internationalized panels in Kosovo is that of the domestic courts. The crimes that have been tried are therefore encompassed in domestic law. Only genocide and war crimes have been encompassed in domestic law through the FRY Code, and in practice only war crimes have been tried. War crimes constitute approximately 10 percent of the cases initiated by international prosecutors since March 2003. Recently there have been fewer prosecutions for war crimes and post-war interethnic violence, especially abuses committed during the period of late 1999 and 2001.¹⁵¹ The ability to pursue further war crimes was severely limited by “the difficulty in collecting evidence in the immediate aftermath of the conflict in 2000-01.”¹⁵² Nonetheless, there has been some notable progress in prosecuting war crimes and ethnically motivated violence.¹⁵³ In late 2003, a verdict was delivered in the first domestic war crimes trial to charge Kosovar Albanians for war crimes within Kosovo itself—the so-called *Llapi* case. The trial attracted widespread public attention.¹⁵⁴

In practice, judges (IJ and local alike) have often failed to refer to any legal sources outside the FRY criminal and criminal procedure statutes and the UNMIK Regulations. These sources, such as the ICTY’s relevant decisions, do not constitute precedent, but could be used as persuasive

¹⁴⁷ The Constitutional Framework incorporates by reference and makes directly applicable in Kosovo several international human rights instruments, including Universal Declaration on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms (with protocols), International Covenant on Civil and Political Rights (with protocols), Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, European Charter for Regional or Minority Languages, and Council of Europe Framework Convention for the Protection of National Minorities.

¹⁴⁸ UNMIK Resolution 1999/1.

¹⁴⁹ *Id.*

¹⁵⁰ UNMIK Resolutions 1999/24 and 1999/25.

¹⁵¹ “Failure to Protect,” *supra* note 33, at 5.

¹⁵² UNMIK, “Focus Kosovo,” Feb. 2004, at 10.

¹⁵³ SG Report, S/2004/907, para. 17.

¹⁵⁴ *The Public Prosecutor’s Office v. Latif Gashi, Rustem Mustafa, Naim Kadriu and Nazif Mehmeti*. It was the first time that the UN-administered court convicted anyone from the Albanian side of war crimes. The accused were indicted for war crimes under domestic applicable law for acts perpetrated against predominantly Kosovar Albanian victims; of 26 victims listed in the indictment, one victim was a Kosovar Serb. The four accused were charged for allegedly participating in the unlawful detention, torture, and murder of civilians from August 1998 to June 1999. For a summary of the *Llapi* case, see OSCE LSMS, “Case Report: The Public Prosecutor’s Office vs Latif Gashi, Rustem Mustafa, Naim Kadriu and Nazif Mehmeti, The ‘Llapi Case,’” Dec. 2003.

jurisprudence. They are rarely cited.¹⁵⁵ In 2002 the OSCE characterized Supreme Court judgments as being marked by “brevity (the average length of decisions is three to four pages), poor legal reasoning, absence of citations to legal authority, and lack of interpretation concerning the applicable law on war crimes and human rights issues.”¹⁵⁶ As a result, the OSCE concluded that the international judges’ decisions “are not useful tools for providing guidance to the local legal community in the complex field of war crimes and international humanitarian law.”¹⁵⁷ Moreover, the decisions are generally not published or otherwise made available beyond the parties, so their reach will likely be very limited.

Some have commented that on occasion IJs and IPs are too wedded to their own traditions to adequately adapt to legal processes in Kosovo. For example, common law prosecutors may draft indictments that are considered too brief for civil law standards. Verdicts have been criticized for brevity, but also praised for being concise. Furthermore, the differences in IPs’ backgrounds can lead to a lack of congruency in charges and sentencing.¹⁵⁸

On April 6, 2004, the new Provisional Criminal Code¹⁵⁹ and Provisional Criminal Procedure Code of Kosovo,¹⁶⁰ which had been promulgated on July 6, 2003, came into effect,¹⁶¹ effectively replacing the domestic applicable criminal laws.¹⁶² These codes were drafted by a working group of a wide variety of legal practitioners and were consolidated by UNMIK’s OLA. These new codes since have the basis of criminal law in Kosovo, along with subsequently promulgated Regulations. The Juvenile Justice Code was promulgated on April 20, 2004, and entered into force on the same date.¹⁶³

This “crucial milestone” brings “the law in Kosovo into greater conformity with regional and European standards and ensure[s] consistency with modern principles of international law, in particular international human rights law.”¹⁶⁴ The new codes introduce substantial reforms to Kosovo’s procedural law, for example, incorporating criminal offenses under international law and sexual offenses, increasing the efficiency of the proceedings (by reallocating responsibilities at the pretrial stage), enhancing the protection of the right of accused, particularly during detention, and strengthening prosecutorial power. Despite some complaints about draftsmanship and lacunae, the Codes have been universally welcomed as an improvement on the old system, under which provisions were applied from numerous different instruments.¹⁶⁵

¹⁵⁵ The case against Momcilo Trajkovic (Kosovar Serb) “Trajkovic.” The decision was made by international majority. The case against Cedomir Jovanovic and Andjelko Kolasinac “Jovanovic/Kolasinac.” Both defendants are Kosovar Serbs. The trial verdict was made with a panel of international majority.

¹⁵⁶ OSCE Report Sept. 2002, *supra* note 72, at 48.

¹⁵⁷ *Id.*

¹⁵⁸ UNMIK, *Focus Kosovo*, *supra* note 152, at 8.

¹⁵⁹ UNMIK Reg. No. 2003/26, On the Provisional Criminal Code of Kosovo, amended by UNMIK Reg. No. 2004/19, June 16, 2004.

¹⁶⁰ UNMIK Reg. No. 2003/25, On the Provisional Criminal Code and the Provisional Criminal Procedure Code for Kosovo.

¹⁶¹ UNMIK Reg. No. 2003/26, *supra* note 159, and UNMIK Reg. No. 2003/25, *supra* note 160. Both were promulgated on July 6, 2003.

¹⁶² UNMIK Press Release, UNMIK/PR/1161, “Speech of DSRSG/Pillar I Jean-Christian Cady in the Seminar ‘On Combating Crime with the New Provisional Criminal Code,’” at the Kosovo Judicial Institute, April 5, 2004, available at www.unmikonline.org/press/2004/pressr/pr1161.pdf.

¹⁶³ UNMIK Reg. 2004/8.

¹⁶⁴ *Id.*

¹⁶⁵ OSCE LSMS, “Review of the Criminal Justice System,” *supra* note 2, states,

The new codes transform the criminal structure into a system more adversarial in nature, and many local Albanian lawyers express pride at a new, “more European” code that has no link to Serbia.¹⁶⁶ As mentioned, the Codes contain a number of new features, including guilty pleas and cross-examination at trial. However, there is widespread concern about insufficient training for this dramatic shift within the national courts. Features such as guilty pleas and cross-examination are foreign to lawyers in Kosovo, who have been trained in a civil law tradition, as well as to IJs from civil law systems.

In addition, the new Criminal Procedure Code also introduced the use of video and audio recording at the pretrial and trial stages. The code also provides for the transfer of Kosovo residents who are wanted in foreign jurisdictions, although this provision should be supplemented by a bilateral agreement with the requesting country. Thus far, UNMIK has signed specific ad hoc transfer agreements of Kosovo residents to the UK and Norway.

VI. DEFENSE AND ISSUES OF FAIR TRIAL

The defense teams in cases involving IJPs comprise mostly local lawyers. They are paid by the Department of the Judicial Administration (DJA) under the Ministry of Public Services (MPS). For certain high-profile cases, such as those against senior KLA officers, private funds have been raised to hire leading defense lawyers. Dozens of Albanian and Serb lawyers have been retained as counsel for such defendants. A notable feature of the Kosovo system has been that national lawyers have had to “raise their game” to face off in these situations. Many observers speak of improvements in the skills of local lawyers, who are adjusting to the adversarial nature of the trials, both in facing IJs and practicing under the new code.

The quality of defense counsel has also been improved through assistance by the CDRC, an NGO staffed by national and international lawyers with support from the OSCE. The CDRC provided direct legal assistance in war crimes cases, including advice and case assistance by international lawyers. Almost all Serb and Albanian lawyers commented on the value of trainings and resources for their efforts. However, although the CDRC was originally meant to significantly bolster the local bar, it has reduced its programs due to lack of funding.

Defense lawyers may be paid privately by their clients, but when they are court-appointed or *ex officio*, counsel receive a maximum of around 250 Euros a month, regardless of hours worked.¹⁶⁷ Payments for *ex officio* lawyers are also often delayed. Moreover, because the payment has a maximum ceiling, there is little incentive for defense lawyers to devote more than a few hours to their cases.¹⁶⁸ There is no legal aid system, and the responsibility for establishing one should be assumed by the new Ministry of Justice, due to begin work in 2006.

After years of drafting and re-drafting, a completely revised set of criminal codes entered into force on April 6, 2004. The codes have their own problems in terms of drafting style, inconsistencies, and lacunae, but are nonetheless a very welcome development. Certainly the codes’ emphasis on the applicability of international human rights standards sends an important message. With the help of bold judicial decisions interpreting and applying the law, it is hoped that the new codes will develop into a more refined judicial instrument (13).

¹⁶⁶ Some Albanian lawyers described this as a response to local demands, while others felt shut out of the process.

¹⁶⁷ Interview with Albanian defense lawyer, Nov. 2003; interview with Serb defense lawyer, Nov. 2003.

¹⁶⁸ For further discussion, see OSCE LSMS, “Review of the Criminal Justice System,” *supra* note 2, at 72.

Despite the improvements brought about by the new codes and the demonstration effect of the involvement of internationals, respect for the rights of the accused remains a concern. Commentators point out that accused continue to be denied the right to challenge decisions on detention,¹⁶⁹ to avoid extended detention,¹⁷⁰ to a speedy trial,¹⁷¹ and to an effective defense.¹⁷² The starting time of the extension of a suspect's detention lacks uniformity, as the new codes are unclear on the starting point of extensions of pretrial custody.¹⁷³ The *habeas corpus* provisions introduced by the new codes have rarely been used to challenge detention.¹⁷⁴ Trials have also been delayed by the absence of witnesses.¹⁷⁵ A recent OSCE report notes that in many cases the reasons for decisions on punishment as well as the reasoning in the Supreme Court decisions on appeals on punishment are insufficient.¹⁷⁶ Even after UNMIK established an international Detention Review Commission in response to criticism about its detention practices,¹⁷⁷ the execution of detentions still lacks adequate judicial oversight.¹⁷⁸ For example, in the *Hajra* case, the accused, now sentenced, were held in detention throughout the proceedings for 33 months.¹⁷⁹ All of these issues point to the need for continued significant improvements to Kosovo's legal system.

VII. COURT ADMINISTRATION AND WITNESS PROTECTION

Because international judges are slotted into the local court system, they make use of pre-existing domestic facilities (with the exception of a single high-security courthouse that has been built). Staffing has been a problem, particularly in areas such as interpretation and stenography. There is a reluctance to use locals for interpretation, so Serb speakers tend to come from Croatia and Albanian speakers from Albania, even though there are significant differences in Kosovo and Albanian dialects. Summary records of the proceedings tend to be compiled by typists, and the general quality is low. IJs are supported by the DOJ's IJSD, which schedules cases and deploys them on a needs basis. This seems to work quite efficiently, but before IJs were recalled to

¹⁶⁹ The OSCE has noticed a lack of proper justification in the decisions on initial detention, the extension of detention orders, and appeals against detention orders in many cases it monitored despite the law provides the otherwise. OSCE Report Dec. 2004, at 16, 18, and 23–24.

¹⁷⁰ According to the UNMIK, as of June 13, 2004, of 459 who were detained, 127 had been detained for more than 6 months, 98 for 3–6 months, and 152 for 1–3 months. “Pillar I: Police and Justice,” supra note 73, at 23. The OSCE has also underscored that the courts fail to substantiate a plausible danger to witnesses to justify extended detention, supra note 169, at 22–23.

¹⁷¹ Furthermore, the right to a speedy trial had been violated in many cases because of delays in obtaining reports by experts, who often had to gather information in a foreign jurisdiction. *Id.* at 30.

¹⁷² The right to an effective defense is often violated, including the right to be represented by counsel at the court and the right to seek sufficient time to prepare the defense, and to have defense counsel seek alternatives to pretrial custody or plead in mitigation or alternative punishment. *Id.* at 68–71.

¹⁷³ *Id.* at 18.

¹⁷⁴ *Id.* at 29. The OSCE considers that judges are uninformed of or inexperienced with the law pertaining to habeas corpus petitions and the provision empowering the pretrial judge to initiate *ex officio* the termination of detention on remand. *Id.* at 33.

¹⁷⁵ *Id.* at 31.

¹⁷⁶ *Id.* at 39–43. The report concludes that “The Supreme Court has therefore not fulfilled its role as the prime interpreter of the law and provide the lower courts with proper guidance on sentencing.” *Id.* at 43.

¹⁷⁷ UNMIK Reg. No. 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders, Aug. 25, 2001.

¹⁷⁸ Carsten Stahn, “Justice Under Transitional Administration: Contours and Critique of a Paradigm,” *Houston J. Int'l L.*, Winter 2005, at 330.

¹⁷⁹ The verdict was made on April 7, 2005. (English summary of a report by Nexhat Buzuku, “185 years imprisonment for 12 Albanians accused in Hajra case,” published by the Kosovo Albanian newspaper Koha Ditore on April 8, 2005, available at kosovareport.blogspot.com/2005_04_01_kosovareport_archive.html.)

Pristina, some said that travel took too much time. One judge claimed that he was sometimes required to drive for a few hours to attend a very short hearing (e.g., on review of detention), and remarked that videoconferencing would have saved time and money.¹⁸⁰ In general, the IJSD also could have used more legal staff to support the IJs.

Due to the ethnic tension in Kosovo and the level of organized crime, UNMIK has devoted considerable resources to protecting victims and witnesses. The UNMIK Regulation on victims and witness protection in criminal proceedings includes the use of so-called “anonymous witnesses,” which allows the court “in exceptional circumstances” to order that the identity of a witness remains undisclosed to the defense.¹⁸¹ This has not generally been a practice in other tribunals, such as the ICTY and the Special Court for Sierra Leone. The anonymous witness provision is also available to defense witnesses.¹⁸²

Despite the extensive provisions for various protective measures,¹⁸³ the protection of witnesses continues to be a challenge, as intimidations and attacks are frequent.¹⁸⁴ Between the end of 2003 and early 2004, there were a number of cases of injury or death to persons involved in investigating high-profile cases.¹⁸⁵ Witnesses’ fear of intimidation or reprisals also poses a challenge in conducting the investigations, particularly in cases relating to the riots of March 2004.

The UNMIK Regulation on witness protection has been incorporated in the new code. The Witness Protection Unit (WPU), a specialized police section that provides physical protection for witnesses, still suffers from major logistical and financial difficulties. Although there is a wide range of measures for concealing the identity of witnesses, few are used, even when danger is anticipated.¹⁸⁶ OSCE recommendations, such as the need to launch a public information campaign on protective measures, have not been fully implemented.¹⁸⁷ On a more positive note, there have been some developments to improve the witness protection system.¹⁸⁸ For example, a training seminar on witness protection was organized by the Kosovo Judicial Institute (KJI) in cooperation with the DOJ and the ICTY, and approximately 30 national and international judges

¹⁸⁰ Interview with IJ, Oct. 2004.

¹⁸¹ UNMIK Reg. No. 2001/20, On the Protection of Injured Parties and Witnesses in Criminal Proceedings, Sept. 20, 2001, amended by UNMIK Reg. No. 2002/1, Jan. 24, 2002, which extended the temporal applicability of Regulation 2001/20, and Administrative Direction 2002/25, Implementing UNMIK Regulation 2001/20, Nov. 12, 2002, Section 4.

¹⁸² UNMIK Reg. No. 2001/20 provides for the use of anonymous witness to applicable defense witnesses, who “shall remain anonymous to the public, to the injured party and their legal representatives, to the injured party as prosecutor or to the private prosecutor,” Section 4.1.

¹⁸³ *Id.* In addition to “anonymous witness,” the Regulation provides for various measures to conceal the identity of witness; e.g., the use of image or voice-altering devices, and closed-circuit television, or videotaped, assignment of a pseudonym, closed sessions to the public.

¹⁸⁴ OSCE Report, Dec. 2004, *supra* note 169, at 74–76.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 76. The OSCE has attributed the rare use of the measures to conceal witnesses’ identity to “a lack of appreciation of the possibility to use protective measures amongst the police, prosecutors and the courts, coupled with a lack of technical equipment in the courts.”

¹⁸⁷ *Id.*

¹⁸⁸ For a discussion of the measures taken, see OSCE LSMS, “Review of the Criminal Justice System,” *supra* note 2, at 74.

and prosecutors attended.¹⁸⁹ In addition, a Victims Advocacy and Assistance Unit (VAAU) was created within the Judicial Development Division (JDD).¹⁹⁰

VIII. QUESTIONS OF COST AND EFFICIENCY

As of the end of 2001, there were approximately 80 ongoing court cases assigned to or selected by international judicial personnel.¹⁹¹ In 2002, IPs handled a total of 40 cases with only a 50 percent conviction rate, and half of those convictions were reversed on appeal, typically before international judges.¹⁹² The number of international judges and prosecutors has increased from 11 in mid-August 2001 to 24 (including 12 judges and 12 prosecutors).¹⁹³ In September 2005, 27 international judges and prosecutors were involved in 60 and 44 cases, respectively,¹⁹⁴ down from 92 in mid-June 2004.¹⁹⁵ Further, since the creation of the Criminal Division within the DOJ, the conviction rate has risen to about 96 percent. As of June 2004, the Criminal Division had initiated 305 cases involving the riot in March 2004 (52 cases), war crimes (38 cases), murder (33 cases), corruption, weapons, terrorism, trafficking (of drugs, weapons, women, and minors), organized crimes, and other serious crimes.¹⁹⁶ These numbers are comparable to those of any domestic system.

The time taken to conclude cases varies significantly. The time frame for cases before international panels tends to be longer than those before national ones, although shorter than those before international tribunals. Judges rarely prepare lengthy judgments and cases typically involve only a few charges. According to UNMIK officials, most IJP trials last for several months, and the longest was approximately six months.¹⁹⁷ Some national judges and lawyers believe that the IJPs handle cases of comparable difficulty at a slower rate than national judges.¹⁹⁸

Although the introduction of the Reg. 64 panels and the extension of IPs' authority led to more efficient management, the caseload continues to be very heavy, creating a serious burden on the international judges and prosecutors in Kosovo.¹⁹⁹ The OSCE observes that the courts are incapable of handling the caseload without delays even though the law provides for the right of accused to be tried within a reasonable time.²⁰⁰ There are a number of factors causing the delay in

¹⁸⁹ The training was held on October 17–18, 2003, in response to the recommendations made in the OSCE report, covering the issues on terrorism, organized crime, and witness protection. The training included lecturing, discussions and case studies. OSCE Report Dec. 2004, *supra* note 169, at 76–77.

¹⁹⁰ Currently VAAU is recruiting, training, and deploying Victims' Advocates throughout the region and providing multifaceted support to victims of crime, including those living in minority communities and enclaves. UNMIK, "Pillar I: Police and Justice," *supra* note 73, at 37.

¹⁹¹ Hartmann, *supra* note 29, at 12.

¹⁹² Interview with UNMIK official, Nov. 2003. Note that this number is lower than the number cited in the Hartmann report, which claims that by October 2002 international panels had handled 90 cases.

¹⁹³ UNMIK, "Pillar I: Police and Justice," July 2004, at 15.

¹⁹⁴ DOJ Weekly Report, Aug. 30–Sept. 5, 2003.

¹⁹⁵ UNMIK, *supra* note 193, at 15.

¹⁹⁶ *Id.* at 15–16.

¹⁹⁷ Interview with UNMIK official, Nov. 2003.

¹⁹⁸ Interview with Albanian national judge, Nov. 2003, noting that IJs handled approximately 3–4 serious cases a year, while national judges handle six cases per month of comparable seriousness.

¹⁹⁹ Schröder, *supra* note 88, at 9.

²⁰⁰ The law sets time limits for different phases of the proceedings. Main trial should be scheduled for a hearing within two months from the date on which the indictment was filled or if the indictment has been traversed. Article 279 FRY CPC, OSCE Report March 2004, at n. 10.

case management, but the major factor is the difficulty of securing the attendance of the accused, witnesses, and injured parties. Furthermore, the courts are understaffed.²⁰¹

The financing of the international panels and prosecution in Kosovo is divided between the budget of UNMIK, which is based on assessed contribution by Member States, and the Kosovo Consolidated Budget. The funding for the IJSD was made through UNMIK budget. This includes salaries for international prosecutors and administrative and other support staff (interpreters, court recorders, and legal officers).²⁰² It has not been possible to obtain exact figures from UNMIK or from the Department of Peacekeeping Operations. With the adoption of the 2001–2002 UNMIK Budget by the UN General Assembly,²⁰³ UNMIK's overall financial resources were significantly decreased,²⁰⁴ leading to cutbacks in a variety of functional areas and departments. This affected particularly UNMIK's DOJ. In 2004, the total amount budgeted for Kosovo's courts was about 17.3 million Euros, or approximately 2.1 percent of the total UNMIK budget for 2004.

As a result of financial shortages, Kosovo's legal system still suffers from a lack of resources to carry out cases effectively and efficiently. Among other issues, the limited number of translators delays court proceedings.²⁰⁵ In addition, due to logistical and financial constraints, Pristina-based doctors could not attend crime-scene investigations and often refused to testify in court.²⁰⁶ Because there are no local experts, forensic evidence was sent abroad (Bulgaria and sometimes Germany) for analysis. The few reports that came back were often cursory and lacked evidentiary weight. However, defense counsel had trouble challenging the findings because of the lack of local experts. This problem has affected particularly cases of war crimes or ethnically motivated crimes.²⁰⁷

Since most international judges and prosecutors are hired at the UN's P4 or P5 level,²⁰⁸ the total associated costs will vary and depend on how many are active, although on average they would be receiving a gross salary in excess of US\$100,000 with daily subsistence allowance in addition.²⁰⁹ In any case, resources available to the international component of the justice system can be presumed to have exceeded resources available to the remainder of the domestic system. International Crisis Group has pointed out that international judges and prosecutors are

²⁰¹ The lack of judges in Zubin Potok and Leposavi /Leposaviq, the two municipal courts opened in the Mitrovicë/Mitrovica region in January 2003, is most severe. As of March 2004, no lay judges have been assigned to either of the courts. OSCE Mission in Kosovo, LSMS "Review of the Criminal Justice System: The Administration of Justice and the Municipal Courts- Protection of Witnesses in the Criminal Justice System." March 2004, at 16.

²⁰² Thordis Ignadottir, "The Financing of Internationalized Criminal Courts and Tribunals," in Romano et al., *supra* note 61, at 283.

²⁰³ A/RES/56/295 of July 11, 2002.

²⁰⁴ The budget for the period from July 1, 2002, to June 30, 2003, was reduced to US\$344,966,100 from US\$413,361,800, the budget for the previous year (A/RES/55/227).

²⁰⁵ Anthony J. Miller, "Nation-Building: Lessons from the Past and the Challenges Ahead: Keynote Address: UNMIK: Lessons from the Early Institution-Building Phase," *New England L. Rev.*, Fall 2004.

²⁰⁶ Marshall, *supra* note 29, at 127.

²⁰⁷ For example, in the Beqiri and Sopi case, more than a year after the indictment of two men for attempted murder, it emerged that the victim, mistakenly believed to be a Kosovar Serb, had been taken to the Pristina hospital and died the following day. The hospital failed to provide this information to the police, the court, or defense counsel, and the legal actors did not follow up on the fate of the victim. Marshall, *supra* note 29, at 128.

²⁰⁸ For the latest salary scales for staff in the Professional and higher categories (effective Jan. 1, 2005), see www.un.org/Depts/OHRM/salaries_allowances/salaries/salaryscale/professional/base0105.xls (last checked on May 23, 2005).

²⁰⁹ Interviews with UNMIK officials, Nov. 2003.

“extremely expensive and currently do not contribute to the development of local capacity.”²¹⁰ The issue of legacy is discussed below.

IX. RELATIONSHIP WITH THE ICTY AND OTHER TRANSITIONAL JUSTICE MECHANISMS

The ICTY retains the authority to take any case involving genocide, war crimes, or crimes against humanity that took place within the former Yugoslavia after 1991,²¹¹ and its jurisdiction is concurrent with that of the national courts.²¹² ICTY prosecutors have made it clear, however, that they are focusing on the most senior perpetrators,²¹³ and UNMIK authorities early on concurred in this division of labor.²¹⁴ In addition to the case against Slobodan Milosevic, the ICTY has initiated several cases involving atrocities committed in Kosovo, against both Serbs and former KLA.²¹⁵ The ICTY eventually charged Ramush Haradinaj, then Prime Minister in Kosovo, who was immensely popular as head of one of the leading political parties. He was indicted along with two other former KLA members, Idriz Balaj and Lah Ibrahim, for crimes against humanity committed against Serbs, Roma, and suspected Serb collaborators during the conflict. Haradinaj was granted provisional release by the ICTY and was also allowed to engage in public political activities insofar as allowed by UNMIK, for the sake of “peace and reconciliation.”²¹⁶

UNMIK justice sector officials have described the relationship with the ICTY as collaborative and “complementary,” noting that UNMIK regularly assists the ICTY with its investigations.²¹⁷ The *Limaj* case, for example, began within the Kosovo courts, pushed by local lawyers, and was eventually handed over to the ICTY.²¹⁸ For the most part, UNMIK officials have not viewed the ICTY as interference, but rather welcome any help they can receive from the tribunal and note that the ICTY is focused on only the highest level of cases.²¹⁹ At least one UNMIK official noted, however, that the ICTY does not give enough advance notice of its moves.²²⁰

Furthermore, Kosovar Albanians complain that the tribunal’s sentences for Serbs are too light, particularly in comparison to local sentences, and they contend that the ICTY has not taken on the biggest crimes that have occurred in Kosovo.²²¹ Periodically policymakers in Kosovo have also discussed the potential utility of a truth commission for Kosovo. They often point to the lack of a forum for public acknowledgement and reconciliation, both in terms of political leadership and at the community level. The historical aspects of the conflict make it difficult to determine the period that a truth commission should address. However, others comment that “the wounds are still fresh,”²²² and one local human rights activist working for an NGO dealing with missing

²¹⁰ “Finding the Balance,” supra note 28, at 9.

²¹¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, Arts. 1–5.

²¹² Id. at Art. 9.

²¹³ Del Ponte, supra note 43.

²¹⁴ Interview with UNMIK official, Nov. 2003.

²¹⁵ See indictments in Pavkovic et al., IT-03-70; Milutinovic et al., IT-99-37; and Limaj et al., IT-03-66, available at www.un.org/icty/cases/indictindex-e.htm.

²¹⁶ Prosecutor v. Haradinaj et al., Interim Decision on Prosecutor’s Motion to Stay the Trial Chamber’s Decision on 12 Oct. 2005 Regarding Conditions for Provisional Release for Ramush Haradinaj, Oct. 21, 2005.

²¹⁷ Interview with UNMIK officials, Nov. 2003.

²¹⁸ Id.

²¹⁹ Id.

²²⁰ Interview with UNMIK official, Nov. 2003.

²²¹ Interviews with Albanian defense lawyers, Nov. 2003.

²²² Interviews with head of OSCE, an Albanian lawyer and spokesman for police, Nov. 2003.

persons said that this question must wait until Kosovo is independent. International prosecutors have pointed to the need for an alternative mechanism to fill the “impunity gap” in terms of cases they are not able to try. The issue of missing persons features prominently in transitional justice issues in Kosovo. Unlike Bosnia, which has a Human Rights Chamber, Kosovo has lacked strong human rights institutions that can be used for transitional justice questions, including property return and reparations.

X. OUTREACH, PUBLIC PERCEPTIONS, AND OWNERSHIP

International tribunals have recognized the importance of public outreach in their work. The environment of the IJP program has been very difficult, with nationalist politics rife in Kosovo and little room for moderate views. However, in this context outreach assumes an increased urgency, but there have been virtually no efforts concerning the IJP program. No town hall meetings have been held and radio coverage has not been regular. None of the UNMIK sections feel clear responsibility for leading this. In contrast, UNMIK police, in building the KPS, have run extensive outreach efforts and invested in their public education and media efforts. They received praise from both Serb and Albanian people.

The trials are open to the public, and UNMIK officials say that public attendance has been high at key trials.²²³ Yet many in the local community complain that key aspects of the proceedings have been closed.²²⁴ UNMIK officials have asserted that closures have been necessary to protect witnesses.²²⁵ The security situation has also posed an ongoing challenge not just to observers, but also to participants. This was particularly the case after the March 2004 riots. To address this problem, the DOJ has provided measures to facilitate access to courts.²²⁶ Following the March 2004 riot, the DOJ has also offered legal support to displaced Kosovar Serbs and has been cooperating with UNMIK police to protect and secure transport of Kosovo Serbian judges and prosecutors, as well as exploring measures for free legal services for victims of the violence in March 2004.²²⁷

The DOJ has adopted a policy of limiting interaction with the media to the Department of Public Information (DPI). Local media coverage tends to be incendiary and biased, and many of the IJs and IPs complain about constant media attacks on them and their decisions. The Institute for War and Peace Reporting conducted some trainings of local media. Members of the local press complain that press conferences are infrequent,²²⁸ and argue that the absence of such contact makes the justice system seem opaque to the press and the public, thereby undermining the rule of law. Some UNMIK officials have noted that they are “losing the battle in the media,” and point to key developments the media did not cover, such as the virtual lack of protests in the wake of the controversial *Llapi* verdicts against Kosovar Albanian defendants charged with war crimes. They emphasize that the local media is beholden to special interests, often inflammatory, and not particularly independent,²²⁹ a fact that even some newspaper editors admit.²³⁰

²²³ Interview with UNMIK official, Nov. 2003; see also interview with Serb defense lawyer, Nov. 2003.

²²⁴ Interview with ethnic Albanian newspaper editor, Nov. 2003.

²²⁵ Interview with UNMIK official, Nov. 2003.

²²⁶ In September 2004, UNMIK police resumed the shuttle bus services. The shuttle service runs between Pristina, Glogovce Glogovac, Lipjan Lipjane, Podujeve Podujevo, and Obiliq Obilic on a weekly basis, with one shuttle running from a different location each day. BBC Monitoring Europe, “UNMIK police to resume shuttle service to courts for Kosovo Serbs,” Sept. 24, 2004.

²²⁷ OSCE Report, May 2004.

²²⁸ Interview with Albanian newspaper editor, Nov. 2003.

²²⁹ Interview with UNMIK official, Nov. 2003.

To a significant degree, perceptions of the IJP system are divided along ethnic lines. Not surprisingly, given that the system was initiated to combat bias against Serbs in Kosovo courts, Serbs within the local legal community generally support the infusion of international actors. This is significant because Kosovar Serbs in the legal community emphasize that most Serbs view the ICTY as partial against Serbs.²³¹ One Serb defense lawyer emphasized that the IJP system is necessary because of lingering division and hostility between the Albanian and Serb populations in Kosovo: “We do not believe each other. Therefore any interethnic or war crimes cases cannot be handled by judges from either of these groups.”²³² He cited IJP decisions to acquit some Serbs after retrial, along with the prosecution of ethnic Albanians for war crimes, as significant in building Serb confidence in the system.²³³

Kosovar Albanians tend to be more negative in their assessment of the IJPs. One issue is the perceived politicization of case selection, discussed above. Many Kosovar Albanians in the legal community contend that the treatment of Serb and Albanian war crimes suspects is imbalanced. They assert that many Serbs are simply not prosecuted, and even those prosecuted ultimately are acquitted or receive light sentences, while Albanian war crimes suspects have been convicted and have received more severe punishment.²³⁴ For example, an Albanian judge cited the failure of UNMIK to prosecute suspects in the wake of Serb riots in 2000 that left 13 Albanians dead as an example of a political “block on prosecutions to avoid more riots.”²³⁵

Despite these criticisms, many Kosovar Albanians in the legal community support the key features of the IJP system. While most see bias built into the system, they do not necessarily allege bias against individual IJs and IPs.²³⁶ Most accept the continued presence of the internationals as necessary and important to ensure a measure of independence and impartiality, and to prevent intimidation. As one ethnic Albanian lawyer stated, before the IJPs, “little was happening. If they had not arrived, there would have been chaos. It was a huge boost.”²³⁷ A Kosovar Albanian judge emphasized that, although the national judges would like more of a role in deciding the division of cases, they “strongly support handing serious cases to the IJs.”²³⁸ A significant reason for this support is that IJs take pressure off local judges and serve on cases that local judges would deem risky to try.

Many in the international community believe that the IJP program has been necessary to prevent the appearance of bias and intimidation in cases that are selected for prosecution.²³⁹ As one international observed, “the national judges were under far too much pressure to function alone without succumbing to threats or bribes. Mere international monitoring could never have been sufficient.”²⁴⁰

²³⁰ Interview with Albanian newspaper editor, Nov. 2003 (noting that newspapers have a problematic history of being funded by parties, interest groups, or grants, and that his newspaper and a few others have tried, unsuccessfully, to raise revenues with advertisements).

²³¹ Interview with Serb defense lawyer, Nov. 2003.

²³² *Id.*

²³³ *Id.*

²³⁴ Interviews with Albanian judge, Albanian lawyers, and Albanian newspaper editor, Nov. 2003.

²³⁵ Interview with Albanian judge, Nov. 2003.

²³⁶ Interview with Albanian judge, Nov. 2003 (asserting that he had seen IJs take direction on how to decide cases from UNMIK authorities).

²³⁷ Interview with Albanian lawyer, Nov. 2003.

²³⁸ Interview with Albanian judge, Nov. 2003.

²³⁹ Interviews with 3 UNMIK official, Nov. 2003; interview with OSCE official.

²⁴⁰ Interview with UNMIK official, Nov. 2003.

However, there exists very little domestic ownership of policy issues, as national legal professionals have not been represented in the DOJ until recently and are not involved in decisions on recruitment or deployment of international judges. Consultation of national counterparts in policy decisions remains limited. The internationals and nationals operate largely in parallel legal universes (although this will likely change with the creation of permanent ministries, including a Ministry of Justice). A recent report calls for UNMIK to “develop a comprehensive strategy for building local judicial capacities and a realistic exit strategy. Kosovar jurists should be involved in the drafting of that strategy.”²⁴¹

A targeted and transparent approach to outreach likely would have blurred the sharp distinction between ethnically based perceptions of UNMIK’s justice activities. More active engagement of the media—including trainings, workshops, access to hearings, and press conferences—could have lessened the political bias that is reflected in their reporting and shapes and reinforces public opinion.

XI. LEGACY

In the abstract, it could be presumed that embedding international judges in a domestic legal system leads to capacity building and legacy. However, the IJP system was initiated in reaction to pressing security and justice needs, not designed around a long-term vision of the system’s legacy. Legacy benefits were part of the thinking behind the original proposal on KWECC, but when the IJP alternative emerged along a separate track as a more immediate solution to the problems of detentions and interethnic cases, these considerations faded.

Nevertheless, a system of international prosecutors and judges integrated directly into the national judiciary presents opportunities for a symbiosis. These include exposure of the Kosovar legal community to international professionals and standards, and demonstrating unbiased legal proceedings, thus helping to build trust in a legal system that many saw as a tool for oppression. However, when international judges and prosecutors leave, what, exactly, will they leave behind, beyond some fairly decided cases?

A hindrance to the “demonstration effect” in Kosovo has been the perceptions of interference by UNMIK executives in the judicial sector, which reinforces the impression that the courts can be manipulated. Furthermore, the “demonstration effect” has also been hindered by the absence of any effective outreach.

Successes in legacy include the fact that some Kosovar judges and prosecutors will benefit from the exposure to international counterparts who may have taught them new skills. For example, some Kosovar judges have expanded their reasoning within judgments and are citing more authority, including the ECHR. A particular legacy success may be the improved skills of the defense lawyers. Many of the judges commented that they have seen a difference in the quality of the defense members who were exposed to the IJP system. However, the potential for full capacity development within the legal profession will be hindered by the absence of a mandate for the IJPs and the fact, as mentioned, many IJs conduct their work alone, with some notable exceptions. Moreover, the language barrier remains a significant obstacle. Training is within the jurisdiction of UNMIK Pillar III, namely OSCE and the Kosovo Judicial Institute, but IJPs have had only limited involvement, citing lack of time.

²⁴¹ Schröder, *supra* note 88, at 23.

A more significant success is the KPS, one of the most multiethnic Kosovar institutions. On some of the most important areas in DOJ, promising developments are under way through the creation of the Special Crimes Unit, a joint operation of the police and Criminal Division. The DOJ is training local police officers and lawyers in the use of new, high-tech surveillance equipment that will reduce the need for relying on witnesses (whom they cannot protect). Over the next year, the DOJ intends to follow the police's example of building an elite, interethnic team that can conduct complex criminal investigations, particularly around issues of organized crime and terrorism.

XII. CONCLUSION

It is generally agreed that IJPs may have to remain in Kosovo even after the bulk of the UN legal staff depart in June 2006. One key question is the extent to which domestic prosecutors and judges are ready to assume responsibility in all cases. An indication of this may be the actions of the judiciary in the aftermath of the riots in March. Bringing to justice those responsible for the March 2004 violence remains a priority in the rule of law in Kosovo.²⁴² International judges and prosecutors had been handling the most serious cases related to the violence, involving burning Serb houses, churches, and monasteries; killings; and violence against the police.²⁴³ However, the bulk of the cases - more than 200 - were dealt with by the local judiciary.²⁴⁴

A recent OSCE report gives an assessment of their performance, concluding that there were difficulties in gathering evidence stemming from intimidation of witnesses and their unwillingness to come forward, the effects of displacement, and the loss of important physical evidence. This resulted in a low number of court cases, including a dismissal of charges in 95 out of 426 cases, and significant delays in 110 cases that are still pending. Also, many accused were inadequately charged, plea agreements were used improperly, resulting in lenient sentences in many cases. Overall, the OSCE finds that "the justice system failed to send out a clear message to the population condemning this type of violence."²⁴⁵ This indicates that additional work must be done with the local judiciary before it is able to fully assume responsibility for all types of crime. The question is by when this will be done, and by whom.

In the interim, UNMIK has handed over many of its powers to local bodies. As for the judiciary, the UNMIK-Government Rule of Law Working Group assists in executing the transfer of powers from UNMIK to Kosovo institutions, as part of the Kosovo Standards Implementation Plan. At the same time, the SRSG still retains broad and ultimate legislative and executive authority in the areas of law enforcement and justice. As of September 2005, UNMIK transferred responsibilities to 13 central government ministries for Kosovo-led Provisional Institutions of Self-Government (PISGs), including an Assembly, Prime Minister, and President of Kosovo. But the Constitutional Framework transferred only a limited number of powers in the field of judicial affairs to the PISGs, such as participation in judicial appointments and training, organization of judicial qualification examinations, organization and maintenance of the courts, provision of material resources to the judiciary, and appointment, training, discipline, and dismissal of court support personnel.

Kosovo-led ministries do not yet include a Ministry of Justice, although plans for such a ministry, as well as the ministry of internal affairs, are now in the advanced stages of being considered by

²⁴² SG Report (S/2005/88), at 24.

²⁴³ BBC Monitoring Europe, "Kosovo: International prosecutors handle most serious cases of March riots," June 17, 2004. As of June 2004, IPs were investigating 52 cases labeled as most serious.

²⁴⁴ BBC Monitoring Europe, *supra* note 246, at 55.

²⁴⁵ OSCE LSMS, "Kosovo: The Response of the Justice System to the March 2004 Riots," Dec. 2005.

UN Headquarters. The Ministry of Justice, as proposed, will have quite limited competencies, including issues of access to justice, running a court liaison program, protection of victims of domestic violence and human trafficking, legal aid, some administration, and drafting of laws relevant to justice. The task of a traditional justice ministry is divided between the DOJ, which is responsible for strategic policy and substantive legal decisions, and the Kosovo-led DJA under the Ministry of Public Services (MPS), responsible for the executive role in administration of the local judicial system. Ultimately, UNMIK will need to hand over the DOJ responsibilities to the PISG. It is currently envisaged that the Ministry of Justice will be created by 2006 and responsibilities handed over.²⁴⁶ But this is no simple task, as there are no nationals trained to take over these tasks.

In late 2005, the DOJ hired approximately 50 local professional staff and is in the process of recruiting more. Even after handover, it is envisaged that UNMIK may still play an oversight and monitoring role, particularly in relation to the justice sector. The KJPC, an independent entity appointed by the SRSG and consisting of local and international members, serves as an advisory body on matters related to judicial appointment, removal, and discipline. UNMIK and KFOR also established the JSECG to provide “a forum for consultation between UNMIK and key stakeholders on the development of a modern and responsive justice sector that will be sustainable after the withdrawal of the international community.” However, none of these mechanisms are particularly robust.

Considering the delay in starting this process, it now seems unlikely that there is sufficient time to adequately train and mentor local recruits before UNMIK starts to wind down in Kosovo - both due to a lack of time from initial recruitment and a lack of spare capacity among international staff who are already overworked.²⁴⁷ Due to the lack of forethought, and in particular Pillar I, the UN may leave Kosovo with a weak Ministry of Justice inadequately equipped to deal with the challenges ahead.

An authoritative report prepared in advance of the final status discussions has concluded that the IJP system should remain in place. The recent report of the Secretary-General’s Special Envoy on Kosovo concludes that “the Kosovo justice system is generally regarded as the weakest of the Kosovo institutions.” The report cites problems of family and clan solidarity, intimidation of witnesses, law enforcement and judicial officials, and the wide-ranging consequences of organized crime and corruption, and finds that:

The Kosovo judiciary and police are fragile institutions. Further transfer of competencies in these areas should, therefore, be considered with great caution...[T]here will be a need for a continued presence of international police with executive powers in sensitive cases. A continued presence of international judges and prosecutors will also be required to handle cases related to war crimes, organized crime and corruption as well as difficult inter-ethnic cases. The currently ongoing reduction in the number of international judges and prosecutors is premature and should urgently be reconsidered. The result of such reductions would be a further loss of credibility of the justice system and of confidence in it among the population in general and the minority community in

²⁴⁶ Interview with senior UNMIK official, Nov. 2003.

²⁴⁷ For the most part, thus far the DOJ has started to downsize through attrition; i.e., posts are not filled when staff members leave the mission. This has left staff shortages in some sections of the DOJ, as international UN staff seek alternative employment before handover. An exception to this policy of attrition is with prosecutors and judges, whose vacant posts are still being filled.

particular. There is little reason to believe that local judges and prosecutors will be able to fulfill in the near future the functions now being carried out by international personnel.²⁴⁸

However, will retaining the IJPs in place build increased dependency on the international community on behalf of the fledgling legal system in Kosovo? Moreover, are the challenges facing Kosovo in terms of transitioning from conflict and violence to organized crime unique? Many of these challenges are inherent to post-conflict societies, and the UN cannot continue to substitute for legal capacity in all such instances.

In late 2005, all of the IJPs were recalled to Pristina and are expected to work on cases in the capital from now on. The trend is therefore towards centralization of the process. Some are hopeful that concentrating international capacity in Pristina will put the IJPs in a better position to make a concerted contribution to legacy. Whether this will be the case remains to be seen and further lessons from the Kosovo experience may need to be elaborated at a later stage.

²⁴⁸ Letter dated Oct. 7, 2005, from the Secretary-General addressed to the President of the Security Council, S/2005/635, appending "A Comprehensive Review of the Situation in Kosovo," at paras. 35, 40.



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